Supreme Court, U.S.
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92-1369

No.

IN THE

SUPREME COURT OF THE UNITED STATES

JOSEPH ALBERICI AND THERESA ALBERICI, H/W

V.

SAFEGUARD MUTUAL INSURANCE COMPANY, ET AL.

PETITION FOR A WRIT OF CERTIORARI

TO THE SUPREME COURT OF

THE COMMONWEALTH OF PENNSYLVANIA

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QUESTIONS PRESENTED

I. Whether the Pennsylvania Supreme Court erred in denying allocatur to review the Superior Court's granting of summary judgment against Petitioner Joseph Alberici, thus letting a decision of the state court contravene the Petitioners' rights under the United States Constitution.

II. Whether the judges should have recused themselves for the obvious, gross appearances of impropriety, partiality, conflict of interest, bias and/or prejudice, and the interaction of the judges violated the judicial code and Petitioners' most fundamental rights.

III. Whether the insurance companies and their law firm, because of their awesome political power are allowed to engage in criminal activity and break the law by knowing and intentional misrepresentation using fraudulent lies of "policy, concealment of fraud and unknown to insureds." These words never existed with Count Five, nor

Exhibit 12 in this civil case or mail fraud case. These false and fabricated words robbed Petitioner and his family of monies due them and Petitioners' right to due process and equal treatment of the law.

IV. Whether Judge LaBrum was allowed to wrest control of this case from the authorized presiding Judge Battle without procedural authority. Judge LaBrum knowingly and willfully erred by giving preferential treatment to the insurance companies and their law firm and by cooperating with and condoning their improper and criminal act in breaking the law and violating Local Rules, Rules of Civil Procedures and related laws because of their awesome political power. This has an obvious appearance of impropriety, partiality, conflict of interest and/or bias to deprive Petitioner of his constitutional right to property without due process and equal treatment of the law.

V. Whether the Pennsylvania Superior and Supreme Courts are allowed to knowingly

and willfully err, cooperate with and condone the improper and criminal activities of the insurance companies and their law firm. The Courts also allowed their gross violations of Local Rules, Rules of Civil and Appellate Procedures because of their awesome political power. These actions are appearances of improprieties, partiality, conflict of interest and/or bias. Besides, they deprived Petitioner his constitutional right to liberty and property without due process and equal treatment of the law.

PARTIES TO THE PROCEEDING

Joseph Alberici and Theresa Alberici,

Petitioners

Safeguard Mutual Insurance Company

PA. Insurance Guaranty Association

General Accident Fire and Life Insurance

Corp., LTD.

Insurance Placement Facility of Pennsylvania

Quaker State Mutual Insurance Group

Home Mutual Insurance Company of

Pennsylvania, Respondents

STATEMENT OF THE CASE

Argument:

Whether the Pennsylvania Supreme Court erred in denying allocatur to review the Superior Court's granting of summary judgment against Petitioner Joseph Alberici, thus letting a decision of the state court contravene the Petitioners' rights under the United States Constitution.

Whether the judges should have recused themselves for the obvious gross appearances of impropriety, partiality, conflict of interest, bias and/or prejudice and the interaction of the judges violated the judicial code and Petitioners' most fundamental rights.

Whether the insurance companies and their law firm, because of their awesome political power are allowed to engage in criminal activity and break the law by knowing and intentional misrepresentation using fraudulent lies of "policy, concealment of fraud and unknown to insureds." These

words never existed with Count Five, nor Exhibit 12 in this civil case or mail fraud case. These false and fabricated words robbed Petitioner and his family of monies due them and Petitioners' right to due process and equal treatment of the law.

Whether Judge LaBrum was allowed to wrest control of this case from the authorized presiding Judge Battle without procedural authority. Judge LaBrum knowingly and willfully erred by giving preferential treatment to the insurance companies and their law firm and by cooperating with and condoning their improper and criminal act in breaking the law and violating Local Rules, Rules of Civil Procedures and related laws because of their awesome political power. This has an obvious appearance of impropriety, partiality, conflict of interest and/or bias to deprive Petitioner of his constitutional right to property without due process and equal treatment of the law.

Whether the Pennsylvania Superior and Supreme Courts are allowed to knowingly and willfully err, cooperate with and condone the improper and criminal activities of the insurance companies and their law firm. The Courts also allowed their gross violations of Local Rules, Rules of Civil and Appellate Procedures because of their awesome political power. These actions are appearances of improprieties, partiality, conflict of interest and/or bias. Besides, they deprived Petitioner his constitutional right to liberty and property without due process and equal treatment of the law.

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CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides as follows:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Sixth Amendment to the Constitution of the United States provides as follows:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall

have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

The Fourteenth Amendment to the Constitution of the United States provides as follows:

Section 1 of the Fourteenth Amendment is the source of many civil rights, and prohibits states from making or enforcing any law which shall abridge the privileges or immunities of citizens of the United States; from depriving any person of life, liberty, or property, without due process of law; and from denying to any person within their jurisdiction the equal protection of the laws. There are thus three distinct provisions guaranteeing the rights of persons and property: (1) the privileges and

immunities clause; (2) the due process clause; and (3) the equal protection clause. The Amendment makes no attempt to enumerate the rights it was designed to protect. It speaks in general terms, and those are as comprehensive as possible. Its language is prohibitory; but every prohibition implies the existence of rights and immunities. The commands of the Amendment are addressed, however, only to the state or to those acting under color of its authority. The Amendment itself erects no shield against merely private conduct, however, discriminatory or wrongful. Similarly, actions of the Federal Government and its officers are beyond the purview of the Amendment.

The protection extended to citizens of the United States by the privileges and immunities clause includes those rights and privileges which, under the laws and Constitution of the United States are incident to citizenship of the United States, but does not include rights pertaining to

state citizenship and derived solely from the relationship of the citizen and his state established by state law. The clause protects all citizens against abridgment by states of rights of national citizenship as distinct from the fundamental or natural rights inherent in state citizenship. The Constitution nowhere defines the meaning of the words "citizen of the United States." Also, the rights of national citizenship have never been completely listed by the Supreme Court.

The due process clause was intended, in addition to other guaranties or private rights, to give increased security against arbitrary deprivation of life or liberty, or the arbitrary spoilation of property. It adds nothing to the rights of one citizen as against another; it simply furnishes an additional guaranty against any encroachment by the state upon the fundamental rights which belong to every citizen as a member of society. The term "due process of law"

refers to that law of the land in each state which derives its authority from the inherent and reserved powers of the state exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions. The guaranty of due process demands only that the law shall not be unreasonable or capricious, and that the means selected shall have a reasonable and substantial relation to the object sought to be obtained. The due process clause does not prohibit action by a private individual, unless the state, in any of its manifestations, has in some way involved itself in the actions of an individual to some significant extent.

The equal protection clause of the Fourteenth Amendment furnishes a distinct right, separate from and independent of the rights protected by the privileges and immunities clause. Rights under the equal protection clause arise only where there has

been involvement of the state or one acting under its authority. It does not add anything to the rights which one citizen has under the Constitution against another. Because the virtue of the right to equal protection of the laws could lie only in the breadth of its application, its constitutional assurance was reserved in terms whose imprecision was necessary if the right were to be enjoyed in the variety of individual-state relationships which the Amendment was designed to embrace. Not every denial of a right conferred by state law involves a denial of the equal protection of the laws within the meaning of the Fourteenth Amendment, even though the denial of the right to one person may operate to confer it on another. The element of intentional or purposeful discrimination is necessary to establish a denial of equal protection of the laws. This may appear on the face of the action taken with respect to a particular class or person, or it may be shown by

extrinsic evidence establishing a discriminatory design to favor one individual or class over another. A discriminatory purpose is not presumed, and must be clearly shown.

STATUTORY PROVISIONS INVOLVED

The United States Code, Act of June 25, 1948, C.645, 62 Stat. 763; May 24, 1949, C.139 §34, 63 Stat. 94, 18 U.S.C. §1341, provides as follows:

"§1341. Frauds and swindles. Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives

therefrom, any such matter of thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both."

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

JOSEPH ALBERICI AND THERESA ALBERICI, H/W

V.

SAFEGUARD MUTUAL INSURANCE COMPANY, ET AL.

PETITION FOR A WRIT OF CERTIORARI

TO THE SUPREME COURT OF

THE COMMONWEALTH OF PENNSYLVANIA

Pro Se Petitioner, Joseph Alberici, hereby petitions for a writ of certiorari to review the decision of the Supreme Court of the Commonwealth of Pennsylvania denying allocatur in favor of Petitioner Joseph Alberici in connection with the granting of summary judgment against him and in favor of Respondent Insurance Companies on his suit for recovery of insurance proceeds.

OPINIONS BELOW

The order of the Superior Court of the Commonwealth of Pennsylvania filed October 31, 1991, affirming the grant of summary judgment against Petitioner Joseph Alberici is contained in Appendix A. A copy of the order of the Supreme Court of the Commonwealth of Pennsylvania denying allocatur is contained in Appendix B.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

STATEMENT OF CASE

This is a Petition for Certiorari arising from a long term travesty of justice involving legal matters all of which arise from circumstances surrounding the agreement to purchase a commercial building and the fight between Petitioners, as policyholders, and their insurance companies for insurance proceeds which became payable upon damage to the building. As noted by distinguished lawyer and author William M. Shernoff, "(m)any policyholders settle a claim for less than is due them as a way of life. Rather than being rescued by the heroic images used by insurance companies such as Paul Revere, John Hancock, or Thomas Jefferson, the policyholder becomes victimized by accusations. He or she is charged with dishonesty, arson, malingering, and fraud." Payment Refused, Richardson & Steirman, Inc., 246 Fifth Avenue, New York, New York, 10001, Copyright

1986, ISBN 0-931933-14-5. To me, and to my wife and family, Mr. Shernoff's words really hit home because this has been our life story since 1978. It was in 1978 that we filed suit against our insurance companies for the proceeds of insurance policies which became payable as a result of a fire which damaged a building we owned. The fire occurred before we purchased the building, but our lawyer told us the agreement we signed placed the risk of loss on us. Our insurance brokers advised us on insurance, and because of some pricing schedules, we were told it was cheaper for us to purchase more insurance than we needed because we could get it for less. Our coverage was about $450,000 of insurance on the land and building plus $50,000 for the contents. A binder for $100,000 of insurance was due to expire in a couple of days, leaving only $350,000 of insurance. The building was a movie theatre plus parking, and we intended to use it for a

catering business or restaurant. At the time, our son wanted to be a chef. He has since become one, a fine one. We purchased the building from a distressed owner for what we believed was much less than the fair market value. Prior to closing, the fire occurred. We were forced to close the transaction. Afterwards we were approached about the insurance proceeds by an adjustor, and we decided to pursue the insurance. As naive fire insurance policyholders, we did not make a fire loss claim because we expected to hear from the insurance companies, because we were told they would contact us. The adjustor approached us at the site October 31, 1977, 13 weeks passed the 30-day deadline contained in the insurance policies. If I had a scheme to defraud anyone, I would have claimed a loss immediately. Eventually I, Joseph Alberici, was indicted for mail fraud. The indictment alleged I had the building burned so that I

could collect insurance proceeds. The federal prosecutors produced witnesses that said they burned the building for me. These witnesses said they used several 55-gallon drums of naphtha and left one at the theatre. Although the Pennsylvania State Police and local crime labs had some type of records about finding a 55-gallon drum, they said the drum contained phenol. Phenol, from what I understand, is an agent for cleaning that would not be uncommon to find in a movie theatre. I don't know what it was. We had not purchased the theatre yet. No one ever found any explosive material; no one ever found a destructive device. The state investigators confirmed this in writing; but the federal prosecutors had some witnesses who testified that they burned the theatre. The one witness, Joseph DiTizio, who the trial judge found to be the only one who provided credible evidence had his family relocated. He received $5,000.00 plus

expenses for his lying testimony. The federal government's alleged arsonists, Vincent Fardella and Joseph DiTizio, were indicted on three counts November 10, 1981. Count Two was for Interstate transportation in aid of racketeering arson. The indictment states: "defendants did travel and cause travel in interstate commerce, from the State of New Jersey to the State of Pennsylvania, with the intent to establish, promote, manage, carry-on and to facilitate the promotion, management, establishment and carrying-on of an unlawful activity, the unlawful activity being arson, in violation of the laws of the State of Pennsylvania, in violation of Title 18, United States Code, Sections 1952 and 2.

This occurred nine months before the Statute of Limitations on arson expired on August 6, 1982. It's incredible that the Commonwealth of Pennsylvania and Delaware County stopped investigating the arson on

September 28, 1978, according to State Trooper DiGiamberdini's report.

(1) The State and County officials knew from the appearance of the building after the fire that no structural damage was done.

(2) They knew no damage was done to the adjoining homes and automobiles. The windows therein were not cracked or shattered.

The alleged arsonists, one in the building and the other outside the front door waiting to pick him up in the get-away car when the explosion allegedly occurred, did not get hurt. They would have been exterminated if the explosion had occurred with the use of 75-gallons minimum or 110-gallons maximum of naphtha (a volatile explosive) according to Agent Lory's hearsay report. It's no wonder Lory's report given to the A.T.F. lab in 1979 and the analysis of it are missing since 1986.

A serious question, it was public knowledge by the many news articles that

appeared, because I was an unindicted co-conspirator – what happened to the State and County officials responsible for a state crime? They were fully silent, besides not interviewing or questioning them or me about a serious crime. This is a violation of my due process and an obstruction of justice. Later my conviction was overturned. Later still, my conviction on Count Five, was reinstated. After my conviction was reinstated on Count Five, the gross inconsistencies of the alleged arsonists and other government witnesses lead me to wonder if the alleged arsonists really did burn the building, and if they did, did they do it the way they said they did. I mean, if they had, I certainly hadn't hired them. I consulted a chemist at the University in Philadelphia, Pennsylvania. This consultant advised me that if 110-gallons of naphtha were lit in the manner described by the witnesses, they would have been incinerated and a gaping hole

left in the ground. But although we had $450,000 of insurance (the government prosecutors referred to it as a "cool half million"), our claim wasn't even for half of that. Not only was there no gaping hole in the ground, there were witnesses left to tell about it. No structural damage was found. I told this to both the District Court and the Appeals Court, but they said they couldn't help since my lawyer could have called this chemist at the trial but he didn't. This same United States Court of Appeals said my lawyer, who didn't use this chemist at trial, was not negligent. Something just didn't seem right. If my lawyer investigated these witnesses, he must have found out about the lies the witnesses told. I think any other tactic which ignores this is negligence. I know I am innocent. Since then I have been investigating and pursuing the same goal in three different lawsuits.

This Petition for Certiorari is my last

chance at restoring my good name and that of my family. That was ruined when the Honorable Judge Pollak noted that although it seems that I had led an exemplary life, I had been convicted. He noted that he didn't know if he would have reached the same conclusion as did the jury. Ironically, this, my last gasp, comes at a time when all three of our lawsuits (with the exception of Petitioner Theresa Alberici's claim for insurance as an innocent co-insured) have been turned down by the Pennsylvania Supreme Court and the United States Court of Appeals, and all within months of each other. The resolution has been that I stand convicted of Count Five. It sent me to prison; it has kept insurance monies from me and my wife; it has ruined our lives. And all of this travesty does not violate our rights, we were told, because I stand convicted of Count Five. Count Five, as a technical matter, has problems, too. The Grand Jury indicted me for Count Five on

evidence labelled Exhibit 49A, supposedly a letter sent from my insurance adjustor to an adjustor who no longer worked for any of the insurance company defendants in my civil case since October 19, 1977, three months before he allegedly received the letter on January 24, 1978. I say this because this letter was supposedly sent from one person to another, each knowing full well of the other's employer, the spelling of the other's name and other important information. However, this Exhibit 49A was sent to a Mr. Derrung. The actual person was Mr. Perrone. The Company name was spelled wrong (Curly vs. Curley) and contained the wrong word (Bureau vs. Company). This Exhibit 49A had no letterhead, no signature, nor a "received" stamp on it, it was addressed to a person who did not exist, at a company that did not exist, and no one ever testified that this letter was ever mailed. At trial, the prosecutor produced a letter and introduced

it as Exhibit 12. Exhibit 12 is entirely different from the Grand Jury Exhibit 49A. It has a letterhead. It has pen marks, little dots, to make it look like it had a signature. No one ever testified that they signed this letter or sent it in the mail. If fact, it looked like a letter that someone had cut and pasted a letterhead on and made a copy. Exhibit 12 had a received stamp on it. Another letter for another count had a received stamp on it. I do not stand convicted on this Count (Six). The same evidence, but not the same result. One is wrong. I think the result on Count Five is.

For years I have struggled through my investigation and have fought on every conceivable ground with a series of lawyers. We have alleged technical violations, factual and legal defenses, constitutional defenses and the like. I even have come to believe that, based upon all the inconsistencies of various legal decisions, perhaps there is a

conspiracy to hide what no one wants to be made public. I have alleged such in the RICO case I am appealing. I think each lawyer failed to see the whole picture. I did not hire the prosecutor's witnesses to burn the movie theater, yet by some twist of the system I stand convicted of this crime. This set of circumstances has led to this Petition.

ARGUMENT

I. THE PENNSYLVANIA SUPERIOR AND SUPREME COURTS ERRED IN DENYING PETITIONERS' REQUEST TO OVERTURN THE ENTRY OF SUMMARY JUDGMENT AND ALLOWANCE OF APPEAL.

A. The evidence was insufficient to prove use of the U.S. Mails, or to prove Petitioner knowingly used them. Petitioner has alleged and testimony below proves the following:

1. ATF agent, Barry Lory, and Pennsylvania State Trooper, William

DiGiamberdini, investigated and found no evidence of a destructive device.

2. ATF agent Lory and Pennsylvania State Trooper DiGiamberdini illegally searched and seized property from our building. They used this property later to falsify evidence for a trumped-up arson explosion in violation of our civil rights under the Fourth Amendment.

3. The Delaware County, Pennsylvania crime lab determined that a 55-gallon drum found at the scene contained a cleaning agent, and this report was given to agent Lory, and DiGiamberdini.

4. No one from Ulmer & Company ever testified at trial that they sold naphtha (the alleged place of purchase of naphtha (that was never found at the scene).

5. Mr. Teplick, from Ulmer, could not identify the alleged arsonists, although it was alleged that Teplick sold the naphtha to them, and he was shown identification

pictures of the alleged arsonists on several occasions. Mr. Teplick was excluded for allegedly violating sequestration.

6. The receipt from Ulmer was tampered with. Agent Lory indicated it was Receipt No. 1480; Mr. Teplick indicated it was Receipt No. 14840; and the receipt itself contained only 148.

7. There was no evidence of use of the U.S. Mails.

8. Exhibit 12 was not sent by certified mail.

9. There is nothing in court record to indicate it was ever mailed.

10. Mr. Horowitz did not send the letter out, and he did not sign it. Mr. Horowitz testified at a deposition on February 12, 1988, that he did not authorize the letter to be sent, nor did he sign it. Mr. Horowitz' testimony was that the letter in question sends our claim. In regard to the effect of this "sends," see Hart, infra.

11. The conviction was purported to be reinstated based upon a charge of delivery. The statute requires knowing delivery, specific intent. No one in my family ever asked the letter be sent or knew it was ever sent.

12. There was a practice in the office of Bertram Horowitz to have documents personally delivered. This is particularly important where, as here, the recipient is so close to the sender.

13. Mr. Horowitz was not personally familiar with the custom and practice of mailing procedures at this office, Young Adjustment Company; besides, his testimony of the normal course of business of his company in August of 1977 was to mail these documents. The letter in question was sent out on January 23, 1978. No one testified concerning the normal course of business on that date. In all of these goings-on, our rights were trampled. The fact that no one

testified that they signed or mailed the claim, and no one testified that they personally were familiar with and knew the office procedure, and that procedure was that all documents are mailed; that, in fact, the procedure was to have some things hand-carried (particularly in the same area of the City); all of these facts indicate that there is insufficient evidence of use of the mails. F.R.E. 602 and 801(c), the knowledge requirement of 803(6), and United States v. Hart, 693 F.2d 286 (1982), White Industries, Inc. v. Cessna Aircraft Co., 611 F. Supp. 1049 (1985).

B. Petitioner's right to Due Process was violated by withholding of information by the District Court and the Prosecutor that Petitioner's Counsel was involved in a grant of immunity.

Petitioner has alleged and proven the following in the Courts below:

1. Petitioner's counsel was offered and

accepted formal immunity in a matter relating to attorney's fees for one Willard E. Moran.

2. The Prosecutor and the District Court entertained Petitioner with a court appearance to determine if Petitioner knew this and was agreeable to his counsel's continued representation.

3. Petitioner's counsel objected to the hearing.

4. The judge misled Petitioner at the hearing, telling petitioner that (i) the manner involved a dispute over fees, (ii) the Judge did not know who the other client was, and (iii) there were no adverse reflections on Petitioner's counsel. This was all lies.

5. Mr. Moran was a convicted murderer.

6. Mr. Tinari, Petitioner's counsel, took a transfer of cash from an organized crime figure across state lines. The person, who paid Mr. Tinari was later found guilty along with another organized crime figure of hiring Mr. Moran for the murder of John

McCullough, head of the roofers union in Philadelphia.

7. Judge Pollak knew the other client.

8. Judge Pollak knew that the Grand Jury matter for which Mr. Tinari was offered and accepted immunity involved a related matter, but the Judge told Petitioner that he had no ground for thinking that Mr. Tinari was anything but faithful.

9. Judge Pollak knew that the other Grand Jury matter involved a Ralph Natale, one who was alleged to be involved in my criminal case.

10. The Prosecutors knew of all of this but failed to so state when asked.

11. Natale was involved with the alleged arsonists. With Mr. Tinari involved with so many crime figures who were intertwined with this case, and with the FBI and the Trial Judge and Prosecutor aware of it, how could Petitioner ever get a fair trial with Tinari as counsel?

12. The Court of Appeals agreed with me that all of this posed a conflict of interest, but then they said I abused the remedy. I think they mean I should have known sooner.

C. The Government had a conflict of interest in prosecuting me.

1. David R. Strawbridge, Esquire, was the Assistant U.S. Attorney who issued the Grand Jury subpoena to me. I appeared and made a statement, at the law offices of Cozen, Begier and O'Connor, because they were representing the insurance companies. Shortly thereafter, Strawbridge joined the Cozen firm. Then Karl Lunkenheimer, who was active in the insurance company defense, went to work as an Assistant U.S. Attorney. Also, in 1988 Michael Baylson, associated with the firm of Duane, Morris & Heckscher, the insurance companies' attorneys since 1984, was recommended by U.S. Senator Arlen Specter for appointment as U.S. Attorney in the

Eastern District of Pennsylvania. This recommendation was approved by John McNichol, Delaware County and The Eastern District's most influential Republican boss. Mr. Baylson is currently in that position. Besides, Mr. Baylson was Senator Specter's re-election Campaign Treasurer in 1986, raising money and using the law firm's time. It looks like the government was prosecuting me for the insurance companies and exchanging lawyers between them to aid in the process. The Cozen firm was forced to withdraw from the matter for their grossly despicable actions and conflicts of interest. I think the government should be conflicted out too.

D. The indictment was improperly framed, grossly in error, legally insufficient, and fraudulent.

1. Quaker State Mutual Group and Eastern Mutual Insurance Company insured the theatre but no claims were made against them. They were included in the indictment to

inflame. It permitted the prosecutor to be able to refer to a "cool half million." The judge should have charged the jury not to include reference to them in their deliberation, and no reference to these two insurance companies should have been permitted. If the reason they were permitted was because my lawyer didn't object, then my lawyer was negligent for not objecting. Taking all of this into consideration, and referring to the indictment, paragraph 4(P), our claims against Insurance Placement Facility, General Accident Insurance Company and Safeguard Mutual Insurance Company amount to only $159,730.70. This figure is not even close to a "cool half million," and the reference thereto was made only to inflame the trial jury.

2. Mr. DiTizio's trial testimony contained repeated denials that he ever talked to Petitioner Joseph Alberici over the telephone. This contradicted the serious and

false charge as set forth in the scheme of the indictment. He was the person the trial judge found to be indispensable to my conviction. This was just after noting that he (the Judge) could not say he would have found as the jury did.

3. The government intimidated then plea bargained the witnesses' testimony in exchange for deals on charges not related to the Petitioner. These witnesses would have said anything to make a deal.

4. I was never charged with arson. (The Pennsylvania Superior Court also found that I could have been convicted without there ever having been a determination that I committed arson. This was in connection with my appeal concerning the state case for insurance proceeds, discussed infra).

5. Count One and Count Three both relate to Safeguard. If Count One and Count Three were set aside, how can Count Five, which relies on Count One, and the Count One

Insurance Company, still stand? Especially since Count Five, which includes Curly Adjustment Co., Perrone and Derrung, on this intangible and irrelevant letter copy, is not even mentioned in the indictment scheme of Count One. Nor are they mentioned in the Count One, Paragraph 4(p).

6. Judge Pollak fatally and grossly erred in reconsidering the prosecutor's Motion to Vacate Order of New Trial. Judge Pollak, after the alleged "reconsideration" found me guilty of Count Five only, based upon Exhibit 12 and not Exhibit 49A, the most insignificant, intangible, and irrelevant mail fraud count of the six-count indictment. Judge Pollak had a moral and ethical duty to exercise his judicial prudence and scholarly experience. He was bound to thoroughly review and analyze the indictment, its scheme, grand jury 49A and trial Exhibit 12. Judge Pollak neglected to do this because if he did do this he would have noticed that I

was not charged two additional counts for Eastern Mutual and Quaker State insurance companies. He also erred when he allowed the prosecutor, in her opening statement, and another prosecutor, in his closing statement, to refer to these two insurance companies. All of this had the effect of placing evidence of trail on eight counts, when the scheme of the indictment mentions only three insurance companies for four counts. In failing to instruct the jury in this regard, Judge Pollak erred. The facts here leave very little doubt as to why all of the mail fraud evidence is missing from Judge Pollak's chambers, the U.S. Attorney's office and the ATF Washington Bureau.

The indictment was drawn in a way to deceive and inflame the jury. Petitioner also believes that an inept scrivener prepared it. Counts Five and Six, by any reasonable look at the indictment, should have referred to Quaker State and Easter

Mutual. But we didn't make claims against those companies. In addition, I think the letter which was submitted in Count Five was fabricated. The indictment was not proved by the trial evidence, and the evidence which was used was deceitfully substituted at trial to make it look worse for us.

E. Counsel was negligent for not objecting to the substitute.

1. Counsel did not object to the substitution of Exhibit 12 for Exhibit 49A.

2. Petitioner did not sign the stipulation for use of Exhibit 12 in substitution for Exhibit 49A. Why would I ever do that anyway?

3. The substitution of Exhibit 12 for Exhibit 49A, now with a received stamp and a letterhead, at such a late stage in the proceedings, deprived me of meaningful confrontation and cross-examination of witnesses. This having been the case, Stirone v. U.S., 361 U.S. 212, (1960)

requires a finding of reversible error. See also U.S. v. Maselli, 534 F.2d 1197 (1976), U.S. v. Goldstein, 502 F.2d 526 (1974), Gaither v. U.S., 413 F.2d 1061, (1969), Ex Parte Bain, 121 U.S. 1, (1887). The decision in my case creates a dichotomy between decisions of different circuit courts of appeals.

This also trampled our rights under the Fifth Amendment and Sixth Amendment, in that the government did not amend the indictment but introduced evidence which proved materially different facts. See U.S. v. Cusmano, 659 F.2d 714 (1981).

F. The Trial Judge entered the Jury Room and tainted the jury in violation of the sanctity of jury deliberations.

1. Judge Pollak entered the Jury Room at 0955 on January 19, 1983.

2. No transcript preserves what was said.

3. Counsel was not present.

4. The proper procedure is to bring the jury into the courtroom for instructions.

5. The jury reached a verdict of guilty shortly after the judge entered the jury room.

6. At Bertram Horowitz's deposition on February 12, 1988, and later, for the 1978 civil case, plaintiffs discovered that the principal issue in all the litigation, Count Five, is false, fraudulent and fabricated.

For all of the foregoing reasons, my conviction on Count Five must be reversed.

7. Judge Rita Prescott held ex parte communications, where our counsel was excluded, both in person and by telephone, with the U.S. prosecutors and at a hearing for discovery. After this ex parte conversation Judge Prescott continued this matter. No evidence was presented to justify the continuances. The prosecutors failed to respond to several rules to show cause why the matter should not proceed.

II. THE GOVERNMENT'S PROSECUTION WAS TAINTED BY ITS FAILURE TO DISCLOSE EXCULPATORY EVIDENCE, BY ITS COERCION OF GOVERNMENT WITNESSES AND BY ITS CASUAL AMENDMENT OF THE EVIDENCE.

A. The prosecution of defendant was tainted by the government's failure to disclose certain exculpatory evidence, by its blatant arm-twisting of government witnesses, and by the process of changing evidence during the investigatory stages of the case to fit its needs as follows:

1. The reports used by certain federal and other crime agencies were not made available to defendant.

2. The reports issued and used as evidence, such as the reports of the B1-County Crime Lab and the Bureau of Alcohol, Tobacco and Firearms Laboratory, are lacking in substantive value in that the reports fail to distinguish between gasoline and naphtha or the amounts of gasoline and naphtha found;

further, the reports fail to show normal percentages of naphtha found in rugs or the atmosphere. Moreover, the ATF Lab relied on ATF Agent Barry Lory's March 27, 1979, report requesting that a Title XI Determination Report (Explosive) be made based on his false hearsay report that the quantity of naphtha, maximum 110 gallons, minimum 75 gallons, was used for the Jerry Lewis Theater fire (FOIA, p. 26). Also, at this point in time the government did not know anything about Ulmer & Co. and Teplick. Lory allegedly interviewed Teplick on June 4, 1979.

3. When Fardella appeared recalcitrant to testify the way the government wished, it filed a Dangerous Special Offender Petition against him and the U.S. Attorney misled Petitioner's attorney on the status of this matter on December 28, 1982.

4. Charles Allen's statements of September 18, 1978 and October 7, 1978,

stated he and Fardella did the alleged arson and did not even mention DiTizio.

5. Allen, the government, and Fardella stated many times that only Allen and Fardella were involved in setting fire to the Jerry Lewis Theater on August 6, 1977. FOIA pp. 20, 22, 25, 28, 29 and 57; also Allen Memorandum of Agreement December 31, 1978, and Allen's information pleading filed with the Court on February 4, 1980, and Fardella's polygraph examination on September 24, 1981.

6. On December 18, 1981, DiTizio filed a motion for trial severance from Fardella, because Fardella had exculpated him at the August 14, 1981 meeting and at the September 24, 1981 polygraph.

7. On December 23, 1981, the government answered DiTizio's severance motion and admitted that Fardella had exculpated DiTizio.

8. On January 4, 1982, AUSA Wehner

sent Burton Rose, DiTizio's court-appointed attorney, a letter saying Fardella stated "that he and Charles Allen committed the arson at the Jerry Lewis Theater at the direction of Allen and that no third person was involved."

B. Judge Pollack granted DiTizio the trial severance on January 18, 1982, and in his memorandum he gave four specific reasons why he granted the severance.

1. Wehner's August 10, 1981 agreement letter to Mr. Simon, Fardella's attorney.

2. Fardella's September 24, 1981 polygraph exculpating DiTizio.

3. Wehner's January 4, 1982, letter to Mr. Rose exculpating DiTizio.

4. Fardella would not exculpate DiTizio and inculpate himself.

C. Fardella in his testimony, January 10, 1983, stated that: "One other person was present when the arson was performed on

August 6, 1977, Charles Allen. No other person was present." p. 60, 61. This conforms with Fardella's statement to the government on August 14, 1981, FOIA, p. 56, and AUSA Wehner's statement in his letter to Burton Rose, DiTizio's attorney on January 4, 1982. Fardella: "I saw DiTizio one time when I came from the Federal Institution to be arraigned, and he was sitting in the back of the court room, and I was told through my attorney that this is Mr. DiTizio." And but for someone telling you, you would not even recognize him today; isn't that correct? Fardella: "Correct." pp. 90-91. Fardella: They wanted me to testify on the Jerry Lewis Theater, and at that time they have five names - I think it was either four or five names they had down, which one was mine, and Charles Allen, and Ralph Natall. "Well, the other names I didn't even know, never met them people in my life." p. 112. Mr. Wehner: "When that statemert was taken by

myself and Ms. Epps you did not tell the truth at that time; isn't that correct?" Fardella: "No." p. 115.

D. That in an early statement to Agent Lory, William Merrill, III, and Gladys Merrill, his mother, and William Merrill, his father, stated that the persons at the theater were in their twenties, and when shown a photo spread containing Fardella, DiTizio and Allen they were unable to identify them. They were not called at trial to identify either Allen, Fardella or DiTizio, even though Fardella, DiTizio and Allen were present or in custody. This fact was never communicated to defense counsel and their statements were not turned over to the defense until February of 1985.

1. Mr. Merrill did not see any drums being put into the theater or removed from the theater.

2. The salesperson at Venuti's Hardware saw pictures of the alleged

arsonists and could not identify them as parties who bought tools in his store, which tools were found at the fire scene.

3. Mr. Teplick also failed to identify the alleged arsonists.

4. The Honorable LOUIS POLLAK, Trial Judge, was involved in the processes of pleas changes and other stages of the prosecution against DiTizio, Fardella and Allen, which processes produced evidence which was so divergent at times to be unbelievable and certainly not credible and he should have seen such inconsistencies.

5. The evidence of explosive agents such as naphtha and the alleged use of such was trumped up, manufactured and otherwise devised so as to give the Court jurisdiction when in fact there were no explosives and no evidence of such.

6. The prosecution failed to disclose Jenks and Brady materials, thereby

violating Petitioner's due process rights and depriving him of a fair trial.

7. Petitioners also suggest that, as stated by Justice Reed in United States vs. Morgan, 346 U.S. 502, at 512-513, "(w)here a petitioner has fully served his prison term for a felony conviction, though the term has been served, the results of the conviction may persist. Subsequent conviction may have heavier penalties (or) civil rights may be affected," Appellant's civil rights are continuing to be affected. Even the defendants below admitted this when they argued that the outcome of the (RICO) case was predetermined by Joseph Alberici's conviction for mail fraud. Petitioners acknowledge this fact, and still allege that the conviction was obtained by false and fraudulent means, (the fabrication and knowing use of fabricated evidence). Appellants believe this resulted in our civil rights being trampled by the powerful, legal,

judicial and political force, carried out by the intimidation.

E. Judge Labrum's actions in declining to disqualify himself were taken in defiance of established rules of judicial conduct and with arrogance concerning the civil rights of appellants. It was not until he again accepted for the basis of his decision the intentionally submitted lies of Mr. O'Hayer that Judge LaBrum decided to disqualify himself.

1. The Superior Court and the Supreme Court of Pennsylvania were duped by the insurance companies, their attorneys, and by Judge LaBrum into believing that somewhere in the Pennsylvania Trial Court records is reference to "policy" and "unknown to insureds" when we indicated in our Motion to Strike based upon black letter law that no such records exist. In a strange, suspicious and tainted manner, our Motion to Strike was denied Per Curiam within seven days without

even waiting for the response by our opposition. Pennsylvania Rules of Appellate Procedure 123(b) requires the filing of an answer within seven days of service. Appellants believe this was in error and it further denied our civil rights

and our rights to due process of law. Our attorney suppressed the denial from us intentionally for five weeks. Also, he failed to inform us that the Appellees intentionally failed to respond to our Motion to Strike although they responded to two later motions for reconsideration of the denial of our Motion to Strike. The Pennsylvania Supreme Court, Per Curiam, saw fit to ignore this serious matter although I filed a reconsideration motion about the insurance companies intentional misrepresentations, fraudulent and fatal false lies with a notarized affidavit verifying to the truth of this. The political power of Mr. McNichol, Mr. Baylson and Senator Specter penetrated the Superior and Supreme Courts. This is unsworn falsification to authorities Pa. 18,4904 (1), (2) and (3), a misdemeanor of the second degree.

The incredible and numerous news articles which appeared between October 15, 1992 and the end of January, 1993 about the alleged scandalous and corrupt misconduct of some members of the Pennsylvania Supreme Court confirms our suspicions.

2. The Pennsylvania Superior Court erred in affirming summary judgment against Petitioner Joseph Alberici, and the Supreme Court of the Commonwealth of Pennsylvania, by denying allocatur, is letter a decision of the state court contravene the Fifth Amendment to the Constitution of the United States.

III. PETITIONERS BELIEVE THAT A FAIR AND IMPARTIAL TRIAL CANNOT BE HAD IN DELAWARE COUNTY.

A. The instant matter has been pending now since 1978. In the years since filing, Petitioners have endured numerous newspaper articles which portray him as a corrupt

politician and alleged arsonist. The latest article appeared in the Philadelphia Inquirer, Suburban Metro Section, Tuesday, October 27, 1992. Petitioners believe that the lies contained in the news article were published intentionally and deceitfully, either directly or indirectly, by Republican Party Boss, Mr. John McNichol, his controlled Delaware County Courthouse, the insurance company defendants and counsel. They did this in a defamatory and libelous manner while this case is set for trial and two related appeals in the Federal Court system were set for rulings on appeal. All of this creates an appearance of impropriety, impartiality, conflict of interest and bias. Petitioners believe this article was published with a reference to Joseph Alberici to mislead and inflame the federal judges who have since then ruled against us. Note that at no time has Joseph Alberici ever been charged, indicted, tried or sentenced for

arson.

1. Eight different judges in 11 shifts have presided over this case. Judge Labrum was involved in three of those shifts. Several judges presided over this case without Plaintiffs ever receiving notice from the Court Administrator's Office that the judge was assigned to the case. In fact, Judge LaBrum ruled on a matter when the Court Administrator had informed us that Judge Battle was the presiding Judge.

2. In the years since the filing, Petitioners have suffered various suspicious occurrences in the Delaware County Courts. These matters have been the subject of various filings of record. Set forth below are the most egregious examples of record.

(a) Petitioners have recently served subpoenas upon the Defendants. A Motion to Quash the Subpoenas was apparently filed, and came before The Honorable Judge LaBrum. Judge LaBrum granted the Motion to Quash over

objections that he should recuse himself. Judge LaBrum did recuse himself from future consideration in the case, but granted the Motion to Quash anyway. If a Judge should recuse himself, we find it unsettling that the Judge should exercise jurisdiction one last time before he bows out. It just makes the whole thing seem manipulative.

(b) We believe Judge LaBrum should have disqualified himself because a judge should disqualify himself when there appears to be an impropriety, when there appears a conflict of interest, when there appears to be bias, or when there appears to be partiality. We have sued Judge LaBrum and have recently appealed as to him. The attorneys representing the insurance companies in this matter, and the insurance companies themselves, are also defendants in the same suit as Judge LaBrum. In addition, all of the aforementioned are potential witnesses in the Civil Rights suit, if our Petition for

Rehearing in the federal civil rights matter was successful. We believe this is the kind of situation where bias should be presumed. In addition, the judge's partiality might reasonably be questioned where he is asked, by co-defendants in one case, to quash subpoenas served in another case upon co-defendants in the first case. In the event the subpoenas elicit a response which is detrimental to the insurance companies in this matter, this might be detrimental to Judge LaBrum and the law firm Duane, Morris & Heckscher in the Civil Rights Case. This appears to represent a conflict of interest.

(c) All of this seems to raise a question of the impropriety of Judge LaBrum exercising jurisdiction to quash subpoenas. We also believe jurisdiction was exercised improperly, that Judge LaBrum knew it to be improper and intentionally acted anyway, and Appellants believe it was done solely for the purposes of Judge LaBrum, the Insurance

Company defendants and their law firm to obstruct justice, by blocking discovery under oath at a deposition, from the fear of exposure of their false and fraudulent acts to the Pennsylvania Supreme and Superior Courts. The deposition would have exposed their intentional criminal act of misrepresentation and big lies of policy "unknown to insureds." We aver and attest that these words absolutely never existed in Count Five, either in this matter or the criminal matter. These words duped the high courts into their rulings against us on fraud because of the "unknown to insureds." The counts of mail fraud containing allegations of policies and "unknown to insureds" were voluntarily dismissed by the prosecutor and the judge. Thus, Mr. Alberici is not guilty on those counts. Since he is not guilty of those counts which relate to insurance companies, how, by any stretch of the imagination can he

be guilty of Count Five? It did not relate to any insurance company, nor does it contain the words "unknown to insureds." Statements of the above were allowed by Judge LaBrum to enter into the record without verification whatsoever while this case was on appeal while the Honorable Joseph Battle was the Judge assigned to the case by the Delaware County Court Administrator. Judge Battle had been the presiding judge as of November 30, 1989. Besides, he completely ignored our motion to strike their lies for lack of affidavits filed April 16, 1990, approximately five months prior to his ruling in error. Appellants believe it was intentionally done in violation of their civil rights, and their rights to due process. In this regard, Appellants also believe the actions of Michael O'Hayer, Esquire in introducing the despicable "unknown to insureds" lies contributed to this violation of our civil rights. When

asked to stipulate to the non-existence of the "unknown to insureds" allegation, Mr. O'Hayer dodged the question with further intentional lies and misrepresentations.

(d) The Delaware County judges have allowed the insurance companies to suppress critical interrogatories by not answering them, although two different judges ordered them to be answered. Our motion for sanctions filed for not answering has been ignored. The insurance companies also intentionally refused to answer our requests for admissions although the Court ordered that they be answered.

(e) Judge LaBrum, on October 4, 1990, granted the Defendants Summary Judgment again:

(i) In defiance of the Pennsylvania Superior Courts' Memorandum and directions of December 3, 1986 for a trial.

(ii) He intentionally ignored Plaintiffs' Motion to Strike the insurance

companies Answers to Plaintiffs Summary Judgments and their Cross Motion for Summary Judgment for lack of the required affidavits in violation of R.C.P. and Phaff v. Gerner, 303A, 2d 826, 451 Pa.146, (1973)

(iii) This case was not clear and free of doubt. Rossi v. Pa. State University, 340 Pa. Super 498 A.2d82, (1985)

iv) Several issues of genuine material fact of record had to be resolved. Pa. R.C.P. 1035(b) and Helinek v. Helinek, 337. Pa. Super ___ ____ 487A. 2d 424 (1985)

(v) The burden of demonstrating that there is no genuine issue of material fact is upon the moving party, Kessler v. Jones Motor Co., Inc. 337 Pa. Super 602, 487 A.2d 424 (1985)

(vi) In fact, the insurance companies in their answers to Joseph and Theresa Alberici's summary judgment on April 2, 1990, admitted in their new matter in No. 9 that: Material issues of fact remain which preclude

the grant of Summary Judgment in favor of Plaintiffs. None of this created an impression on Judge LaBrum. For the official and political power and pressure of our opponents, he granted the insurance companies' summary judgment. One material issue to be resolved was the voluntarily dismissal of five counts of mail fraud, which were the only related and relevant counts to the insurance companies. Plaintiffs did not have this critical issue when the Superior Court remanded this case back to the lower court in 1986.

(f) Judge LaBrum ruled on the Defendants' Summary Judgment while this case was on appeal in violation of R.A.P. 311(3). Besides, our attorney sent him a letter on September 19, 1990, two weeks before his ruling of October 4, 1990, suggesting that further proceedings were not permitted. Also, he allowed a memorandum of law to remain of record which was filed five and

one-half months late over the objection of Plaintiffs in violation of R.A.P. 311(e) and Pennsylvania Black Letter Law.

(g) Judge Kelly originally entered summary judgment in favor of Defendants, but it was reversed on appeal.

(h) Judge LaBrum granted summary judgment in favor of Defendants three years after the first order of summary judgment. Judge LaBrum's ruling was substantially similar to the ruling of Judge Kelly. Judge LaBrum's order granting summary judgment has also been reversed on appeal. Besides, they defiantly and blatantly disregarded the directions of the Superior Court when they remanded the matter back to the lower court back in 1986.

(i) Defendants routinely file motions without affidavits or verifications in violation of the Rules of Civil Procedure. The Delaware County Court routinely permits the motions to be heard despite our objection

for lack of affidavit. They also refused to submit affidavits in their lying answer to our Motions for Summary Judgment in violation of the Pennsylvania Rules of Civil procedure and in violation of Phaff v. Gerner, 303 A.2d 826 (1973).

(j) In granting summary judgment, Judge LaBrum failed to examine the record of the federal criminal trial to determine whether the disposition in the federal court included a determination that Joseph Alberici committed arson. This is a dispositive issue concerning Petitioner Joseph Alberici's right to be included in this matter.

(k) Our attempted discovery addressed to the matters of (i) whether an explosion occurred at the Jerry Lewis Theater, (ii) whether there were eyewitnesses to the alleged arson, and whether those eyewitnesses could identify the alleged arsonists, etc., was blocked by the Delaware County Court by the granting of protective orders.

Petitioners still allege no explosion occurred; and all parties, defendant as well as their counsel, know this. Judge LaBrum, in March, 1979, quashed subpoenas and depositions for discovery that lasted over a year without any evidence whatsoever to justify it.

(l) Despite evidence to the contrary, Delaware County Courts have ignored the fact that Defendants, by counsel, have placed documents of record and included false affidavits from Dora C. Shafer, the alleged president of Respondent Safeguard. Our motion to strike these documents because the affidavits were false and because Oscar Gaskins, Esquire was the president of Respondent Safeguard, was dismissed by Judge Toal.

(m) Judge LaBrum's actions in declining to disqualify himself were taken in defiance of established rules of Judicial conduct and with arrogance concerning the civil rights of

Petitioners. It was not until he again accepted for the basis of his decision the intentionally submitted lies of Mr. O'Hayer that Judge LaBrum decided to disqualify himself.

A. Harter v. Reliance Insurance Co., 562 A.2d 330 (1989) permits recovery of insurance proceeds by Petitioner Joseph Alberici.

B. Harter permits recovery if Petitioner's conviction includes a determination that he is/would be guilty of arson.

C. The Superior Court has determined that my conviction for mail fraud did not include, as a necessary condition, an allegation of or proof of arson.

D. The Superior Court has determined the threshold question but has misapplied the corresponding law.

E. The Superior Court also noted that it appeared I was trying to fight my conviction in the civil case, but absent fraud, perjury or other error, they could not let me do it.

F. I have been arguing fraud, perjury and violations of my constitutional rights. No one is listening. The Supreme Court of

Pennsylvania denied me allocatur. I need your help.

G. I have filed RICO, Civil Rights, and other claims. I believe all of these cases are about the same thing, the violation of our rights to due process, to liberty and property without due process of law. Our rights have been trampled because of the awesome legal and political power wielded by the Respondents.

H. The Superior Court erred in ignoring our brief and hundreds of exhibits which indicate Constitutional violations, a conviction obtained by fraudulent means and denying our Motion to Strike based upon Pennsylvania black letter law. This was all done without justification.

SHOULD THE JUDGES HAVE RECUSED THEMSELVES FROM THE OBVIOUS AND GROSS APPEARANCES OF IMPROPRIETY, PARTIALITY, CONFLICT OF INTEREST, BIAS AND/OR PREJUDICE

AND THE INTERACTION OF THE JUDGES INVOLVED IN THE RELATED CASES AS FOLLOWS:

Judge Van Antwerpen erred when he denied the disqualification of U.S. Attorney Baylson and Duane, Morris & Heckscher; he also erred in his decision to dismiss the complaint. Also, his biased remarks against me indicate his bias. (Judge Van Antwerpen, in reciting the case history, says I burned down a building. I never did any such thing, and no such thing has ever been alleged or proven.) He should have disqualified himself as soon as he agreed to accept Senator Arlen Specter's offer when he extended an olive branch offering of a prestigious elevation to the Court of Appeals during the time he was considering the merits of our case. Judge Van Antwerpen knew about the tainted influence of our opponents' connections from the pleadings on record and possible inquiries. He should have disqualified himself from presiding in this case because

he knew the above created an appearance of impropriety, partiality, conflict of interest and bias.

Incredible and unreal. Political influence and pressure was applied for 14 years in our three cases. Besides the misconduct through the appearances of impropriety, partiality, conflict of interest, bias and/or prejudice and unlawful actions through intimidation and perjury, etc., it appears as if government officials, insurance companies, attorneys and politicians are "ABOVE THE LAW AND JUSTICE." This is a travesty of justice, a national disgrace and outrage. Also, the interaction of the federal district courts, courts of appeal, and court en banc is incredible and unusual and leaves much for the imagination to ponder over. All of this transpired under the color of law and justice against our civil rights.

CONCLUSION

For all of the foregoing reasons, we respectfully request that the Court grant Certiorari and review the decisions of the Pennsylvania Superior and Supreme Courts. The facts presented herein compounded with many improprieties in the entire case history warrants a finding that our most fundamental rights were grossly violated.

Respectfully submitted,

_____

Joseph Alberici

APPENDIX

APPENDIX A

JOSEPH ALBERICI AND THERESA ALBERICI, Appellants	:	IN THE SUPERIOR COURT
v.	:	OF
SAFEGUARD MUTUAL INSURANCE COMPANY, GENERAL ACCIDENT FIRE AND LIFE ASSURANCE CORPORATION, LTD., THE INSURANCE PLACEMENT FACILITY OF PA., QUAKER STATE MUTUAL GROUP AND HOME MUTUAL INSURANCE COMPANY OF PA., Appellees	:	PENNSYLVANIA
	:	No. 2928 Philadelphia 1990

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the Court of Common Pleas of DELAWARE County be, and the same is hereby AFFIRMED IN PART, REVERSED IN PART AND REMANDED FOR FURTHER PROCEEDINGS. JURISDICTION IS RELINQUISHED.

BY THE COURT:

David A. Szewczak
Prothonotary

Dated: OCTOBER 31, 1991

APPENDIX B

IN THE SUPREME COURT OF PENNSYLVANIA EASTERN DISTRICT

JOSEPH ALBERICI and THERESA ALBERICI, Petitioners	:	No. 1061 Eastern District Allocatur Docket 1991
v.	:	
SAFEGUARD MUTUAL INSURANCE COMPANY, GENERAL ACCIDENT FIRE AND LIFE ASSURANCE CORPORATION, LTD., THE INSURANCE PLACEMENT FACILITY OF PA., QUAKER STATE MUTUAL GROUP and HOME MUTUAL INSURANCE COMPANY OF PA., Respondents	:	Petition for Reconsideration

ORDER OF COURT

PER CURIAM

AND NOW, to wit, this 8th day of October, 1992, the Petition for Reconsideration in the above matter is hereby denied.

TRUE COPY FROM RECORD
Attest: October 8, 1992

/s/ PATRICIA JOHNSON

PATRICIA JOHNSON
Chief Clerk
Supreme Court of Pennsylvania
Eastern District

MAR 15 1993

No. 92-1369

In The

Supreme Court of the United States

October Term, 1992

JOSEPH ALBERICI AND THERESA ALBERICI, H/W,

Petitioners,

v.

SAFEGUARD MUTUAL INSURANCE COMPANY, GENERAL ACCIDENT FIRE AND LIFE ASSURANCE CORP., LTD., QUAKER STATE MUTUAL GROUP, AND HOME MUTUAL INSURANCE COMPANY OF PA, INSURANCE PLACEMENT FACILITY OF PENNSYLVANIA,

Respondents.

Petition For Writ Of Certiorari To The Supreme Court Of Pennsylvania

BRIEF IN OPPOSITION

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8311

I. COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Does this Court have jurisdiction to review a state court's entry of summary judgment in favor of defendant insurers and against a claimant of fire insurance proceeds, where the state court determined that the claimant was barred from recovering the fire insurance proceeds due to his prior conviction for mail fraud in connection with a scheme to defraud the insurance companies?

A. Does the state court decision sought to be reviewed here rest upon an adequate and independent state law basis?

B. Does this case involve a substantial federal issue to be determined by this Court?

C. Did petitioners raise, and preserve, a substantial federal issue during the proceedings in state court?

2. Was the state court judgment here sought to be reviewed incorrect?

II. PARTIES TO THE PROCEEDINGS

Joseph Alberici and Theresa Alberici,

Petitioners

Safeguard Mutual Insurance Company
Pennsylvania Insurance Guaranty Association
General Accident Fire and Life Insurance Corp., Ltd.
Insurance Placement Facility of Pennsylvania
Quaker State Mutual Insurance Group
Home Mutual Insurance Company of Pennsylvania,

Respondents

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V. REFERENCE TO THE OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS DELIVERED BELOW

The opinion of the Pennsylvania Superior Court in this case is reprinted in the appendix as Exhibit "A". It is a memorandum decision, which has not, as yet, been reported either officially or unofficially. The opinion of the trial court (reprinted in the Appendix as Exhibit "B") granting defendant's Motion for Summary Judgment is reported at 78 Del. Co. Rep. 144 (1991). The Supreme Court of Pennsylvania's decision not to grant allowance of appeal was issued on August 18, 1992. The Pennsylvania Supreme Court's refusal to reconsider its denial of the Petition for Allowance of Appeal was issued on October 8, 1992. Neither decision has been reported in either an official or unofficial reporter.

VI. COUNTERSTATEMENT OF GROUNDS ON WHICH JURISDICTION IS INVOKED

Respondents note that petitioners assert jurisdiction in this Court under 28 U.S.C. §1254. Apparently, petitioners have cited the wrong statute, as 28 U.S.C. §1257 governs this Court's jurisdiction to issue writs of certiorari to state courts.

There is no basis for jurisdiction in this Court. Established principles of federalism prohibit this Court from reviewing the decisions of state courts which rest upon an adequate and independent state law basis. This case, which involves a determination by the courts of the Commonwealth of Pennsylvania, that a claimant's conviction of mail fraud, on a charge of scheming to defraud fire

insurers, prohibits his recovery under the policies of insurance issued by those fire insurers, implicates only the proper interpretation to be put to Pennsylvania common law. This case does not affect, in any manner, federal statutes, treaties, or common law.

Moreover, even if it should be determined that, in the abstract, some kind of federal question is implicated by this case, it is apparent that no novel, unique, or substantial question is present. Without a substantial federal question, this court is without jurisdiction to issue the requested writ.

Finally, an examination of the record in this case will reveal that Petitioner has failed, completely, to raise or preserve a substantial federal issue during the state court proceedings. Only now, when confronted with the need to concoct some basis for this court to exercise jurisdiction, has Petitioner come forward with the alleged constitutional violations of which he now complains. The failure to raise and preserve a federal issue in the proceedings below precludes review of such issues here. As such, this Court is without jurisdiction to hear this case.

VII. RELEVANT CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS.

There are no relevant federal constitutional provisions, treaties, statutes, ordinances or regulations bearing upon this case.

VIII. COUNTERSTATEMENT OF THE CASE

In May of 1977, petitioner, Joseph Alberici, entered into a contract to purchase a movie theatre located in Aston, Pennsylvania, known as the Jerry Lewis Theatre. Settlement on the sale was scheduled for August of that year. Shortly before settlement, however, a fire broke out resulting in substantial damage to the theatre.

After the fire, Mr. Alberici proceeded to settlement on the purchase of the theatre. He also submitted claims to the various insurers covering the fire risk. In sworn proofs of loss submitted to the insurers, Mr. Alberici stated that the cause of the fire was "unknown to insureds." Though the purchase price for the theatre had only been $210,000.00, the total amount of insurance purchased by Mr. Alberici exceeded $450,000.00.

The insurers refused to voluntarily settle the fire loss claims, and Mr. Alberici, along with his wife, commenced the present action in the court of Common Pleas of Delaware County, Pennsylvania.

Law enforcement agencies investigating the fire quickly determined that it was incendiary in origin. Subsequent investigations culminated in an indictment being issued against Mr. Alberici by a grand jury in the United States District Court for the Eastern District of Pennsylvania. The indictment charged Mr. Alberici with engaging in a scheme to defraud his insurance companies by hiring arsonists to burn the movie theatre, so that he could recover the fire insurance proceeds from the policies covering the theatre.

The criminal case was tried to a jury before the Honorable Louis Pollack of the Eastern District of Pennsylvania, in 1981. The jury returned a verdict of guilty on all six counts of the indictment. During the post-trial motions, however, District Judge Pollack vacated the guilty verdicts for five of the six counts, due to a perceived variance between the language of the indictment, and the manner in which Judge Pollack charged the jury. The verdict on the remaining court of the indictment, Count V, was allowed to stand. Mr. Alberici was convicted on that count, and judgment of sentence was imposed.

Meanwhile, the insurers, Respondents here, pleaded defenses of fraud and arson in response to the suit brought by Mr. Alberici on the fire insurance policies. Once Mr. Alberici's conviction on Count V of the indictment had been established in the District Court, the insurers asserted a collateral estoppel defense. The insurers contended that Mr. Alberici's conviction for mail fraud conclusively established his fraudulent conduct. Under provisions of the insurance policies, required by Pennsylvania statute to be contained in all fire insurance policies, any fraud on the part of the insured will act to void the policies. Asserting this estoppel argument, the insurers moved for summary judgment, which was granted by the trial court.

Mr. Alberici appealed the grant of summary judgment to the Pennsylvania Superior Court. The Superior Court determined that because the mail fraud conviction had not yet been affirmed on appeal, disputed issues of fact remained, precluding summary judgment. The suit was, accordingly, remanded to the trial court.

Shortly, thereafter, Mr. Alberici appealed his conviction to the U.S. Court of Appeals for the Third Circuit, which affirmed the entry of judgment of sentence. *U.S. v. Alberici,* 735 F.2d 1351 (3d Cir. 1984). A subsequent Petition for Writ of Certiorari filed with this Court was denied. *Alberici v. U.S.*, 469 U.S. 1072 (1984). Mr. Alberici served the sentence imposed upon him of 22 months incarceration at the Allenwood Federal Correctional Facility.

On remand of the state court action, further discovery was conducted. Mr. Alberici was served a set of Requests for Admissions asking him to admit that his conviction had been affirmed by the Third Circuit, and that this Court denied certiorari. Alberici admitted these facts. Based upon this record, the insurers again moved for summary judgment, which was granted.

On appeal to the Pennsylvania Superior Court, the judgment entered against Joseph Alberici was affirmed, while the judgment against his wife, Theresa Alberici, was reversed. In its opinion, the Superior Court held that the conviction of mail fraud established, as a mater of collateral estoppel, Mr. Alberici's fraudulent conduct in connection with his insurance claims. Giving force to the anti-fraud provisions required to be contained in the insurance policies, the court determined that Mr. Alberici was barred from recovery under those policies which contained the anti-fraud clause.

One of the policies did not contain an anti-fraud provision. Nonetheless, the Pennsylvania Superior Court determined that Mr. Alberici was barred from recovery, under long established Pennsylvania case-law holding

that a criminal wrongdoer may not be allowed to profit from his wrongdoing, as a matter of public policy. *See*, Opinion of the Pennsylvania Superior Court reproduced in the Appendix as Exhibit "A".

Joseph Alberici filed a Petition for Allowance of Appeal with the Supreme Court of Pennsylvania seeking review of the Superior Court's decision. The Pennsylvania Supreme Court, however, refused to grant Allowance of Appeal, by Order dated August 18, 1992. Mr. Alberici filed a motion for reconsideration with the Pennsylvania Supreme Court, which was denied, by order dated October 8, 1992.

The currently pending Petition for Writ of Certiorari was originally filed with this Court on or about December 31, 1992. The petition was initially rejected from filing by the Clerk, and was refiled on or about February 12, 1993.

Respondents note that petitioner does not confine his factual allegations to the Statement of the Case section of the Petition for Writ of Certiorari. In his *pro se*, 65 page filing, petitioner makes a multiplicity of allegations and charges, which are presented in a rambling and somewhat incoherent manner. Respondents will attempt, consistent with the requirements of Sup. Ct. R. 15, to address all material misstatements of fact or law set forth in the Petition for Writ of Certiorari. However, given the difficult style of exposition employed by the Petitioner, Respondents observe that a complete refutation of the welter of allegations and claims stated in the Petition is nearly impossible.

IX. SUMMARY OF ARGUMENT

This Court is without jurisdiction to grant the Writ of Certiorari requested by petitioner herein. Petitioner requests a Writ of Certiorari to be issued to the Supreme Court of the Commonwealth of Pennsylvania so that this Court may review the decision reached by the appellate courts of Pennsylvania affirming entry of summary judgment against Joseph Alberici. These decisions, awarding summary judgment against Joseph Alberici and affirming that award of summary judgment, were reached in reliance upon clear and uncontroverted principles of state law, having no implication, whatsoever, upon the federal constitution, statutes, treaties, or other sources of federal decision making. Instead, the decision to enter judgment against Joseph Alberici rested solely upon application of Pennsylvania common law principles. Since no substantial federal issue is implicated by the Pennsylvania state court determinations in this case, and since those determinations rest entirely upon an adequate and independent state law basis, this Court is without jurisdiction to issue the Writ of Certiorari which has been requested.

Moreover, even if it were to be determined that some manner of federal issue was implicated in this case, it is apparent that the entry of judgment against Joseph Alberici in this action was appropriate, and requires no further review by this Court. The crux of Mr. Alberici's argument to this Court is that his initial criminal conviction was, somehow, in error. He seeks, by means of this Petition, review of the propriety of that conviction.

Despite Mr. Alberici's desires in this regard, these issues have already been exhaustively litigated in the

United States District Court for the U.S. Court, during post-trial motions, and on appeal, to the U.S. Court of Appeals for the Third Circuit. Additionally, Mr. Alberici has petitioned this court for a Writ of Certiorari concerning his criminal conviction, which petition was denied on December 3, 1984. *U.S. v. Alberici*, 469 U.S. 1072 (1984). Mr. Alberici's claims have therefore been rejected at every step of the proceeding. The Pennsylvania state courts' decision to deny Mr. Alberici his claim for insurance proceeds, as a result of his conviction for fraud, represents nothing more than the implementation of the salutary judicial policy that, at some point, judgments must be deemed to be final, and litigation must be put to an end. In this case, Mr. Alberici's criminal conviction has been the subject of exhaustive review and re-examination, and the state court's application of that conviction for collateral estoppel purposes need not be disturbed here.

X. ARGUMENT

A. THIS COURT IS WITHOUT JURISDICTION TO ISSUE THE REQUESTED WRIT OF CERTIORARI.

1. The Decision Sought to be Reviewed Rests Upon Adequate and Independent State Grounds, Precluding Further Review by this Court.

A copy of the Superior Court's decision affirming the grant of summary judgment against Joseph Alberici has been reprinted in the Appendix. As a review of that decision will reveal, the Pennsylvania Superior Court's determination that summary judgment was properly entered against petitioner, Joseph Alberici, rests solely,

and exclusively, upon application of Pennsylvania common law and statutory precepts. Specifically, the Superior Court's decision involves a determination as to what effect, if any, is to be accorded to Mr. Alberici's criminal conviction on the charge of mail fraud. As a matter of Pennsylvania state law, the Pennsylvania Superior Court determined that the proper application of Mr. Alberici's conviction required that summary judgment be entered. As that decision involves no interpretation of federal statutory, regulatory, or constitutional precepts, and relies, instead, upon Pennsylvania authority, established principles of federalism require that this court refuse to review the Pennsylvania state courts' decisions in this matter.

This Court's power to review the final determinations by the several state courts of last resort has always been limited. In the Judiciary Act of September 24, 1789, Congress, in Section 25, first passed legislation authorizing this Court to review determinations by state appellate courts, and, at the same time, circumscribed the scope of that review.

Originally, jurisdiction over state courts was limited to cases in which the state court had held some federal act invalid, or had upheld the validity of a state act against a claim based upon the federal constitution or laws. The limited review granted to this Court over state court decisions is understandable, given the unique nature of our system of federalism. While ordinarily it is unusual for the court of one sovereign to have appellate jurisdiction over the courts of other sovereigns, given the nature of the federalist system itself, and the constitution's explicit grant of supremacy to the federal system,

the ability of this Court to exercise some form of appellate jurisdiction over the courts of last resort of the several states has only rarely been questioned.

At the same time, however, the limited nature of that appellate jurisdiction has *always* served as a necessary counterbalance to the federal court's superior position. As has been well stated by Justice Jackson:

> This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds . . . The reason is so obvious that it has rarely been thought to warrant statement. It is founded in the partitioning of power between the state and federal judicial systems and in the limitations of our own jurisdiction. *Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights.* Our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion.

Herb v. Pitcairn, 324 U.S. 117, 125-126 (1945). (emphasis added).

Currently, the limits of this Court's jurisdiction to review decisions by state courts are set forth in 28 U.S.C. § 1257 which provides, in its entirety, as follows:

> (a) Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn

> into question or where the validity of a statute of any state is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or any authority exercised under, the United States.
>
> (b) For purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

28 U.S.C. § 1257.

Instantly, even a cursory review of the decision by the Pennsylvania Superior Court in this case indicates that no question has been raised regarding the validity of any treaty or statute of the United States, nor has any Pennsylvania statute been drawn in question on the ground that it is or was repugnant to the Constitution, treaties, or laws of the United States. Similarly, on its face, it is apparent that the Superior Court's decision does not address, in any manner whatsoever, any claim by the Albericis of a title, right, privilege, or immunity which is especially set up or claimed under the Constitution, treaties, statutes, or other authority of the United States.

Instead, the claim asserted by Mr. Alberici appears to be grounded solely upon the principles of Pennsylvania contract law. As a holder of insurance policies issued in Pennsylvania, Mr. Alberici has brought this case asserting that the insurers have failed to fulfill their contractual obligations by refusing to compensate him for a loss. Though Mr. Alberici now claims (for the first time) that

the Pennsylvania state courts' refusal to grant judgment in his favor amounts to a deprivation of due process, the mere denial of a contractual claim does not qualify as a denial of due process. *Tidal Oil Co. v. Flanagan,* 263 U.S. 444 (1924).As was the case in *Tidal Oil,* in this case there is no denial of due process for the reason that:

> The parties to this action have been fully heard in the state court in the regular course of judicial proceedings and in such a case the mere fact that the state court reversed a former decision to the prejudice of one party does not take away his property without due process of law.

Id., 263 U.S. 444, 450.

As such, by its plain terms, § 1257 of the Judiciary Act appears to bar this Court's grant of the requested writ of certiorari.

Though there can be little question regarding the state common law and statutory basis for the Pennsylvania Superior Court's decision in this case, Respondents are aware of the cases, decided by this Court, holding that a state court's refusal to accord appropriate claim and issue preclusion status to a prior federal judgment raises a federal question reviewable here. *See, e.g, Stoll v. Gottlieb,* 305 U.S. 165 (1938); *Toucey v. New York Life Insurance Co.,* 314 U.S. 118 (1941); *Limbach v. Hooven & Allison Co.,* 466 U.S. 353 (1984). In those cases, however, this Court's discretion to grant certiorari has been exercised only where the state court proceedings have refused to give effect to the prior federal decision. *See, e.g., Stoll* ("As the contention is that the ruling below disregarded decrees of a Court of the United States it raised a federal question reviewable under Section 237(b) of the Judicial

Code, 28 U.S.C.A. § 344(b).") and *Limbach*, ("We perceive in this case no state-law overtones that, by any stretch of the imagination, could serve to insulate the case from review here. We are concerned with federal issues *and a contention that a state court disregarded a federal constitutional ruling of this Court*. The issue, then, is reviewable here.") (Emphasis supplied).

In the present case, however, there is no contention that the courts of the Commonwealth of Pennsylvania failed to give effect to a federal court's decision. To the contrary, this case involves the opposite of the situation in *Stoll* and *Limbach*, in that the Pennsylvania state courts have given appropriate deference and enforcement to the conviction entered by the District Court following Mr. Alberici's trial. As such, no federal question is presented for review by this court.

2. There is no Substantial Federal Issue to be Determined by this Court

Though Respondents contend that the decision here sought to be reviewed rests upon an adequate and independent state law basis, it is conceded that the application of a federal court judgment can, possibly, be seen as involving a federal question. Even so, it is clear that this case involves absolutely no *substantial* federal issue to be determined by this Court.

The failure to present a substantial federal question for review undercuts this Court's jurisdiction to review a state court judgment. Where it appears that an insubstantial issue has been raised, the writ of certiorari will be dismissed as improvidently granted. *Duncan v. Tennessee*,

405 U.S. 27 (1972). As was noted in *Equitable Life Assurance Society v. Brown*, 187 U.S. 308 (1902):

> There must be a real, substantive question on which the case may be made to turn, that is, a real and not a merely formal Federal question is essential to the jurisdiction of this court. Stated in another form, the doctrine thus declared is, that although, in considering a motion to dismiss, it be found that a question adequate abstractly considered to confer jurisdiction was raised, if it likewise appear that such question is wholly formal, is so absolutely devoid of merit to be frivolous, or has been so explicitly foreclosed by a decision or decisions of this court as to leave no room for controversy, the motion to dismiss will prevail.

Id., 187 U.S. 308, 311 (1902).

Of course, this requirement of substantiality has been codified in this Court's Rules of Procedure. Sup Ct R. 10.1 advises that a writ of certiorari will only be granted where there are "special and important reasons therefore." An examination of the issues raised in this case, however, discloses that no "special and important" reasons exist to justify review.

This case involves a relatively routine application of a federal judgment for purposes of collateral estoppel. This is a common place, common law determination involving no unique, unusual or substantial issue. In fact, the standard for proper application for federal criminal judgments in subsequent civil actions was established by this Court in *Emich Motors Corp. v. General Motors Corp.*, 340 U.S. 558 (1951). That standard was followed by the Pennsylvania Superior Court in this case, and has not

been disturbed by this Court in the forty years since the *Emich* decision was rendered.

Employing the *Emich* reasoning, the Pennsylvania Superior Court properly determined that Mr. Alberici's conviction for mail fraud necessarily included a finding that Alberici had engaged in a fraudulent course of conduct relating to the insurance policies which he presently sues upon. Since, under *Emich*, courts are free to apply criminal convictions where the issues are "distinctly put in issue and directly determined in the criminal prosecution," the Pennsylvania Superior Court correctly determined that the finding of fraud in the criminal court conviction could properly be applied in the Pennsylvania state court suit on the insurance policies. Turning, then, to Pennsylvania state law, the court determined that the anti-fraud clauses included in the insurance policies (as required by Pennsylvania statutory law) prohibited Mr. Alberici from making recovery under those insurance policies.

Since the standards for application of a federal criminal conviction are not in dispute, and have not been in dispute since the decision in *Emich*, and since the application of the federal criminal conviction in this case appears to have been correct, there is no substantial federal issue for this Court to review. Accordingly, certiorari should be denied.

3. Petitioners Failed to Raise Any Substantial Federal Issue in the Proceedings Below

A review of the complaint filed in this action indicates absolutely no claim of a federal right or interest

asserted by the plaintiffs. Instead, the complaint sets forth a relatively mundane contract claim under the principles of Pennsylvania common law. *See*, Plaintiff's Complaint in Assumpsit, a copy of which is reproduced (without attachments) in the Appendix as Exhibit "C".

When confronted with the claim of collateral estoppel based upon his criminal conviction, Mr. Alberici made no argument that the application of his criminal conviction in this case somehow violated federal constitutional, statutory or common law precepts. Instead, the sum and substance of Mr. Alberici's resistance to the application of collateral estoppel has been that his criminal conviction was, in the first place, improper. Never, during the state court proceedings, has Mr. Alberici raised a claim that the *manner* in which his conviction was being applied constituted a violation of any federally secured right. In sum, Mr. Alberici does not contend that the use of his conviction for collateral estoppel purposes has been carried out in a constitutionally defective manner. Instead, his argument appears to be that the conviction, itself, is invalid, despite the conviction's affirmance upon appeal. In fact, nowhere in the record of this case has Mr. Alberici asserted the denial of due process which he presently claims. Only now, when required, on petition to this Court, to justify jurisdiction, has Mr. Alberici raised such claims.

It is axiomatic, however, that on petition for a writ of certiorari to be issued to a state court, the federal claim must have been raised, and preserved initially, in the state court proceedings. *Tacon v. Arizona*, 410 U.S. 351 (1973). The failure to raise a significant federal issue at

the stages of proceedings required by state law will preclude further review in this Court. *Edelman v. California*, 344 U.S. 357 (1953). In Pennsylvania, issues not raised by an appellant on the initial appeal, and clearly set forth in the "questions presented" section of the appellant's brief, will not be addressed by the appellate court, and are deemed waived. Pa. R.A.P. 2116 (a); *Park v. Chronister*, ___ Pa. Commw. ___, 617 A.2d 863, 868 (1992). An issue, once waived in the state courts, will not be reviewed by this Court. *Beck v. Washington*, 369 U.S. 541 (1962).

In his appeal to the Pennsylvania Superior Court, Alberici raised no due process question regarding the application of his federal criminal conviction in the state court proceeding. Though he currently complains of a denial of due process rights, a review of the Statement of Questions presented by Mr. Alberici in his superior Court brief fails to raise, either directly or by implication, any federal constitutional issue whatsoever. *See*, Alberici Statement of Questions Presented in the Superior Court, a copy of which is attached hereto as Exhibit "D". Since no such issue was raised in the Superior Court, considerations of comity and federalism preclude this Court from granting further review. As such, the writ sought by Alberici in this case must be denied.

B. EVEN IF THIS COURT DETERMINES THAT A SUBSTANTIAL FEDERAL QUESTION HAS BEEN RAISED, WHICH WAS PROPERLY PRESERVED BELOW, CERTIORARI NEED NOT BE GRANTED, AS THE PENNSYLVANIA DECISIONS IN THIS CASE WERE PROPER

Petitioner contends that the Pennsylvania courts erred by holding that his conviction collaterally estopped

him from collecting fire insurance proceeds, for the reason that the conviction, itself, was somehow in error. Whether the conviction was erroneous or not, however, is a matter which is currently quite beside the point. The conviction has been affirmed on appeal. No habeas corpus proceeding has been pursued. For all intents and purposes, the conviction is an accomplished judicial fact. Now is not the time, and this court is not the place, for Petitioner to question the propriety of that conviction.

Yet, as a review of the currently pending petition makes clear, Petitioner's sole objective remains to protest his innocence of the charge upon which he already stands convicted. The "argument" portion of the Petition for Writ of Certiorari is divided into three main headings and 13 subheadings. Under the first main heading (arguing that the entry of summary judgment was error) six argument subheadings are included. All of these contentions relate to the propriety of the original conviction. Similarly, the second main argument heading refers, exclusively, to alleged abuses of governmental power in connection with Mr. Alberici's trial and conviction.

In fact, the complaints made by Mr. Alberici with regard to the conduct of the civil suit for insurance proceeds are quite limited. First, there is his belief that there is a conspiracy, involving the judges of the Delaware County Court of Common Pleas (as well as the former U.S. Attorney, the current Attorney General of Pennsylvania, and many others), to deprive him of his insurance proceeds. As has been noted by both the trial court in this action, and the Pennsylvania Superior Court, Mr. Alberici's complaints in this regard amount to little more than suspicion and innuendo; no specific allegation of bias,

collusion, or other judicial impropriety has been raised below, or here.

In fact, the *only* allegation of error made by Mr. Alberici regarding the Pennsylvania courts' application of the federal conviction for collateral estoppel purposes concerns his claim that the phrase "unknown to insureds" does not appear in the civil court record. Beyond the fact that this allegation does not raise a federal issue, it is apparent that this allegation is false.

Taken in a light which is most favorable to him, Mr. Alberici's complaint appears to be that the state courts improperly concluded, on the basis of his conviction, that Mr. Alberici misrepresented to his insurers that the cause of the fire was unknown to him. Alberici makes this argument because, according to him, the phrase "unknown to insureds" did not appear in Court V of the indictment, the only count upon which his conviction was allowed to stand. The fallacy in this argument is apparent.

The phrase "unknown to insureds" appears in Count I, paragraph 4 of Mr. Alberici's indictment. Though the verdict against Alberici on Count I was vacated by the District Court, the language contained in paragraph 4 of Count I, including the "unknown to insureds" wording to which Mr. Alberici so strenuously objects, was incorporated into Count V by the terms of the indictment. The conviction on Count V, therefore, necessarily included the allegation that Mr. Alberici falsely represented to the insurers that the cause of the fire was unknown to him.

As for the contention that the "unknown to insureds" language was never made a part of the civil court record,

the indictment was attached to the Request for Admissions served upon Mr. Alberici as part of discovery in the trial court. In fact, Mr. Alberici admitted that the copy served upon him was a true and correct copy, and also admitted that he was convicted on Count V of the indictment.

Since the only issues complained of by Mr. Alberici in his Petition relate to matters which have already been finally adjudicated, in his prior criminal conviction, or are patently frivolous, there is no reason for this Court to grant the requested writ of certiorari. The Petition should, therefore, be denied.

XI. CONCLUSION

This Petition fails to raise any issue appropriate for review in this Court. The decision sought to be reviewed rests upon an adequate and independent state law basis, and involves no substantial federal issue. Moreover, no issue of a federal nature was either raised or preserved below. Finally, the decision of the Pennsylvania state courts was properly reached in this case, requiring no further review.

The Petition for Writ of Certiorari should be denied.

DUANE, MORRIS & HECKSCHER

BY

MICHAEL O'HAYER
HUGH M. EMORY
Attorneys for Respondents

EXHIBIT A*

JOSEPH ALBERICI AND THERESA ALBERICI, Appellants v. SAFEGUARD MUTUAL INSURANCE COMPANY, GENERAL ACCIDENT FIRE AND LIFE ASSURANCE CORPORATION, LTD., THE INSURANCE PLACEMENT FACILITY OF PA., QUAKER STATE MUTUAL GROUP AND HOME MUTUAL INSURANCE COMPANY OF PA., Appellees	:	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 2928 Philadelphia 1990

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the Court of Common Pleas of DELAWARE County be, and the same is hereby AFFIRMED IN PART, REVERSED IN PART AND REMANDED FOR FURTHER PROCEEDINGS. JURISDICTION IS RELINQUISHED.

BY THE COURT:

/s/ DAVID A. SZEWCZAK
PROTHONOTARY

Dated: OCTOBER 31, 1991

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* Any typographical and/or incorrect punctuation found in the following Appendix pages were left intentionally to show accurately how the original documents appeared.

JOSEPH ALBERICI AND THERESA ALBERICI, Appellants v. SAFEGUARD MUTUAL INSURANCE COMPANY, GENERAL ACCIDENT FIRE AND LIFE ASSURANCE CORPORATION, LTD., THE INSURANCE PLACEMENT FACILITY OF PA., QUAKER STATE MUTUAL GROUP AND HOME MUTUAL INSURANCE COMPANY OF PA., Appellees	:	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 2928 Philadelphia 1990

Appeal from the Order of the Court of Common Pleas of Delaware County, Civil division at No. 78-10515.

(Filed Oct. 31, 1991)

BEFORE: POPOVICH, HUDOCK & MONTGOMERY, JJ.

MEMORANDUM:

We are asked to review the grant of a motion for summary judgment entered against the plaintiffs/appellants, Joseph Alberici and Theresa Alberici, his wife. We affirm in part and reverse in part.

In assessing the grant of a motion for summary judgment, we apply the well-established standard of review:

> Motion for summary judgment may be granted only if "the pleadings, depositions, answers to interrogatories and admissions on

> file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Pa.R.Civ.P. 1035(b). In passing on a motion for summary judgment, this Court will view the record in the light most favorable to the non-moving party. *Kerns v. Methodist Hospital*, 393 Pa.Super. 533, 536-537, 574 A.2d 1068, 1069-1070 (1990); *Salerno v. Philadelphia Newspapers*, 377 Pa.Super. 83, 88, 546 A.2d 1168, 1170 (1988). In doing so, we accept as true all well-pleaded facts in the appellants' pleadings and give appellants the benefit of all reasonable inferences drawn therefrom. *Ector v. Motorists Ins. Companies*, 391 Pa.Super. 458, 4630464, 571 A.2d 457, 460 (1990). Summary judgment is appropriate only in those cases which are free from doubt. *Id.*

Dublin v. Shuster, ___ Pa.Super. ___, ___, ___ A.2d ___, ___ (J.-A19002/91, filed ___ ___, 1991) (Slip Opinion at 4-5).

This case has had a protracted history in the judicial system. In 1978, the plaintiffs filed a complaint in assumpsit against the defendants/insurance companies[1] for their failure to honor "loss claims" for damage caused by a fire to a building insured by the defendants for a total price of $224,244.00.

Separate answers were filed by Safeguard Mutual Insurance company and the remaining four insurers. In

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[1] The named defendants consist of Safeguard Mutual Insurance Company, General Accident Fire & Life Assurance Corp., Ltd., The Insurance Placement Facility of Pennsylvania, Quaker State Mutual Group and Home Insurance Company of Pennsylvania.

particular, Safeguard alleged in new matter that the fire was a result of arson and denied liability, while the other insurers asserted that a "concealment, fraud" clause in their policies voided the contracts because the plaintiff, Joseph Alberici, "acting on his own behalf as well as the behalf of the other plaintiff, did on March 31, 1978, under oath, willfully, deliberately and maliciously with intent to defraud . . . defendants, conceal[ed] the true origin of the aforesaid fire when, in fact, such origin was well known to him." See Paragraphs 56 & 54, respectively. Also, all insurers contended that the plaintiffs had no insurable interest in the insured property. Paragraphs 50 & 60, respectively.

On March 28, 1985, the defendants filed a motion for summary judgment claiming that the conviction of the plaintiff, Joseph Alberici, for mail fraud in federal court was an absolute bar to his recovery under the policies of insurance; Theresa Alberici was barred as well since she had no insurable interest in the property and her husband's procuring the incendiary fire insulated her from recovering under the policies of insurance.

In answer to the motion for summary judgment, the plaintiff Joseph Alberici asserted that his guilty verdicts on all six counts in federal court were overturned; he was granted a new trial on all counts save for number five (mail fraud); absent proof of arson, Joseph Alberici believed that the sending of the "loss" claim to the insurers was not mail fraud; and Mrs. Alberici did have an insurable interest because: (a) the property was purchased with assets jointly owned by the couple, (b) she was the "nominee" of her husband under the agreement of sale (causing a resulting trust to come into existence),

and (c) the absence of her name on the two Safeguard policies "was a pure oversight by the broker".

On March 25, 1986, the defendants filed a response to Theresa Alberici's partial motion for summary judgment. Therein the defendants denied that Joseph Alberici at any time designated his wife as his "nominee" under the agreement of sale to purchase the property in question. According to the defendants, Joseph Alberici's intent was to list a corporation as the "nominee". This was predicated upon the depositions of one Richard C. May and the plaintiff himself. See Exhibits A & B attached to Response of Defendants In Opposition To The Motion of Plaintiff, Theresa Alberici, For Partial Summary Judgment.

Further, the defendants denied having any knowledge of the source of the funds allegedly used to purchase the property or the intentions of the plaintiffs relative thereto. See Paragraphs 5-7. Also, the defendants asserted that Joseph Alberici's conviction for fraud extinguished his right to collect the proceeds of the defendants' insurance policies. See Paragraphs 13 & 15. Lastly, the defendants denied that there were no genuine issues of material fact in existence. In a memorandum of law submitted in conjunction with the defendants' objections, they "disputed" Theresa Alberici's claim that she was the "nominee" of Joseph Alberici. And they were of the belief that Joseph Alberici's wrongful conduct prevented his wife from benefitting therefrom. Thus, they requested that the motion be denied.

By order and opinion filed March 11, 1986, the defendant's motion for summary judgment was granted;

Theresa Alberici's request for partial summary judgment was denied. An appeal was perfected to this Court, and a panel reversed and remanded because:

> . . . [w]e d[id] not believe appellee[s] met [their] burden of establishing no genuine issue of material fact. Our review of the record le[d] us to conclude that this case involve[d] issues to be resolved in the trial court. * * * Accordingly, we reverse[d] the lower court's grant of summary judgment and remand[ed] th[e] case. . . .

Instead of the case proceeding to trial on remand, the plaintiffs submitted interrogatories to which the defendants objected. Likewise, the defendants filed a request for admissions to which the plaintiffs objected.[2] Nothing

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[2] The Request For Admissions Directed To Plaintiffs read in relevant part at page 5:

> 18. That Count V of the indictment reads "1. Paragraphs 1 through 4 of Count I are hereby incorporated by reference."
>
> 19. That by virtue of Count V's incorporation of paragraphs 1-4 of Count I, the allegations of fraud and scheming to defraud referred to in requests for admissions 2-14 were included in Count V, and were charges upon which Plaintiff Joseph Alberici was convicted.

In a follow-up Motion to Determine The Sufficiency Of Responses To Defendants' Request For Admissions, it was averred:

> 6. It is undisputed that Mr. Alberici was convicted of Count V of the indictment, which alleged the scheme that Mr. Alberici had entered into, as well as

was being resolved between the litigants. For example, a pre-trial report was filed by the defendants on May 20,

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> his fraudulent submission of claims, and that Mr. Alberici's conviction has become final by virtue of his exhaustion of all appellate procedures.
>
> 7. . . .
>
> 8. In order to establish the facts of Mr. Alberici's indictment and conviction for the purposes of the record in this case, Defendant caused to be served upon Plaintiff their Requests for Admissions. . . .
>
> 9. In response to these Requests for Admissions, Plaintiffs filed and served upon Defendants their Objections to Request for Admissions. . . .
>
> 10. . . .
>
> 11. The [Plaintiffs'] objections are clearly without any basis in law or fact. . . . Defendants are entitled to establish the facts of Mr. Alberici's conviction so that this Court may apply the principles of res judicata and collateral estoppel.

The plaintiffs' Response to Defendants' Motion To Determine The Sufficiency Of Responses To Defendants' Request For Admissions averred in pertinent part:

> 4. Denied. At no time has Joseph Alberici ever been charged with arson, a state crime; secondly, there was no conviction of mail fraud which was relevant to any claims relating to the Defendants in this action. . . .
>
> 5. . . .
>
> 6. Denied. It is in fact disputed that any indictment related to a scheme culminating in fraudulent

1988, wherein they alleged that Joseph Alberici could not recover under any of the policies of insurance because: (1) he participated in procuring the fire which destroyed the insured building; and (2) his conviction for mail fraud in connection with the submission of claims to the insurers. As for Theresa Alberici, she could not recover because she supposedly had no insurable interest, and, moreover, her husband's fraud worked to void the insurance coverage (under the "concealment/fraud" clause).

Notwithstanding the filing of the pre-trial statement, on the same date Theresa Alberici filed another motion for summary judgment in which she alleged, in relevant part, that the agreement of sale's reference to a "nominee" was meant to encompass her as an owner of the property; she provided funding and incurred an indebtedness to help purchase the property; and the omission of her name from two of the six policies of insurance was an "oversight" by the broker who sold the policies. See Paragraphs 2, 4-8 & 10. In an affidavit attached to the motion, Theresa Alberici swore that the plaintiffs had intended to own the property jointly, that on July 18, 1977, a corporation created to operate the property once it

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submission of claims or that any indictment or count thereof is relevant to this action.

* * *

13. Plaintiffs deny that there was any conviction on any count or indictment relevant to his action and plaintiffs ask that defendants produce evidence of a relevant conviction.

became a restaurant/catering hall met and officially designated her as the "nominee" of her husband as referred to in the agreement of sale, and the initial deposit ($5,000.00) and balance of the purchase price constituted a joint effort by the plaintiffs. See Paragraphs 2-6. These claims were repeated in the memorandum of law submitted simultaneously with the motion and affidavit.

Similarly, the plaintiff Joseph Alberici filed his own motion for summary judgment on October 7, 1988, in which he contended that the revenue to purchase the property was obtained in the name of the plaintiffs from lending institutions and his wife had an undivided interest in the property.

With regard to his federal indictments, the plaintiff alleged that he was acquitted of all counts relevant to the insurance companies. In fact, he urged, he was never charged with fraud. And, he was found not guilty of defrauding Safeguard and he was never charged with arson. Curiously enough, the two plaintiffs submitted additional motions for summary judgment on February 14 & 20, 1990, wherein it was asserted that Joseph Alberici was not convicted of mail fraud in federal court in relation to any of the defendants, and the "concealment of fraud" clause referred to "fraud in the inducement" in obtaining the policies and not to subsequent fraud. Therefore, fraud was not a proper defense.

On April 2, 1990, the defendants filed a Cross-Motion For Summary Judgment setting forth the averment that Joseph Alberici was indicted on August 31, 1982, for six counts of mail fraud; he was found guilty of all counts on January 19, 1983, with affirmance of the judgment of

sentence by the Third Circuit Court of Appeals; five of the six policies of insurance had an antifraud clause; Count V of the federal indictment incorporated paragraphs 1-4 of Count I, which contained general allegations that Mr. Alberici participated in a scheme to defraud the various insurance companies, and that he hired arsonists to destroy the property insured; and Theresa Alberici had no insurable interest in the property insured, it never being Joseph Alberici's intent that she would hold title to the property over a corporation established to take title.

Thereafter, on February 7, 1991, summary judgment was entered in favor of the defendants on grounds that: (1) Joseph Alberici's conviction for mail fraud by a federal jury precluded his recovery under any of the policies at issue; (2) Theresa Alberici was denied recovery because no credible evidence was presented to indicate that she had any legal or insurable interest in the property, nor could she be permitted recovery in light the antifraud provisions in the policies activated by Joseph Alberici's fraudulent submission of claims.

An appeal was perfected to this Court challenging the entry of the motion for summary judgment on various grounds.[3] The first question posed claims the commission of error on the part of the court below in "ignoring" this Court's previous panel decision and the ruling in *Harter v. Reliance Insurance Co.*, ___ Pa.Super. ___, 562 A.2d 330

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[3] By per curiam order dated August 29, 1991, the appellants' motion for reconsideration of the motion to strike the appellees' supplemental reproduced record and portions of the appellees' brief filed in this case was denied.

(1989), "in regard to the need of the Defendants to prove that Mr. ALBERICI'S previous conviction was a determination that he was guilty of arson, and the decision of *Maravich v. Aetna Life and Casualty Co.*, [___ Pa.Super. ___,] 504 A.2d 896 (1986) in regard to the issue of an innocent co-insured spouse's right to recover under the policies." Appellants' Brief at 11.

We disagree with the appellants' interpretation of *Harter*. We read the case to stand for more than the proposition espoused by the appellants that a conviction on an indictment for mail fraud must include an allegation of arson to bar any recovery under a fire insurance policy.

In *Harter*, the insurer/Reliance attempted to utilize the insured's federal conviction for mail fraud (which included an allegation of arson) to deny coverage under the long-established law in Pennsylvania that a criminal conviction on a charge of arson bars recovery by the defendant on any related fire insurance policy. See *Mineo v. Eureka Security Fire and Insurance Co.*, 182 Pa.Super. 75, 125 A.2d 612 (1956).

Upon review of the federal record[4] (indictment and charge to the jury), the *Harter* Court ruled that the insured was not charged with arson, nor was arson an element of the mail fraud crime for which the defendant was tried and convicted. Thus, the allegation of arson

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[4] The burden of production was on the insurer to provide the state trial court with the federal record of the insured's criminal trial. *Harter v. Reliance Insurance Co.*, ___ Pa.Super. ___, 562 A.2d 330, 335 (1989).

was not a necessary condition of the federal jury's verdict on mail fraud. This rendered erroneous the trial court's receipt of the insured's conviction for mail fraud as conclusive proof of the insured's guilt of arson, and preclusion of recovery under the policy of fire insurance.

In determining what was actually decided by the prior federal verdict, the *Harter* Court relied upon the doctrine of estoppel and looked to the formula set forth by the United States Supreme Court in *Emich Motors Corp. v. General Motors Corp.*, 340 U.S. 588, 71 S.Ct. 408, 414, 95 L.Ed. 534 (1951):

> . . . such estoppel extends only to questions *distinctly put in issue* and *directly determined* in the criminal prosecution. . . . In the case of a criminal conviction based upon a jury verdict, issues which were essential to the verdict must be regarded as having been determined by the judgment.
>
> * * *
>
> The difficult problem, of course, is to determine what matters were adjudicated in the antecedent suit. A general verdict of the jury or judgment of the court without special findings does not indicate which of the means charged in the indictment were found to have been used in effectuating the conspiracy. And since all of the acts charged need not be proved for conviction, *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 [60 S.Ct. 811, 84 L.Ed. 1129] (1940), such a verdict does not establish that defendant used all of the means charged or any particular one. Under these circumstances what was decided by the criminal judgment must be determined by the trial judge hearing the treble-damage suit,

> upon an examination of the record, including the pleadings, the evidence submitted, the instructions under which the jury arrived at its verdict and any opinion of the courts. *Sealfon v. United States*, [332 U.S. 575, 578, 68 S.Ct. 237, 92 L.Ed. 180 (1948)]; *cf. State of Oklahoma v. State of Texas*, 256 U.S. 70 [41 S.Ct. 420, 64 L.2d. 831] (1921).

___ Pa.Super at ___, 562 A.2d at 335 (Emphasis in original).

As in *Harter*, our review of the federal indictment and opinions of the District Court (reproduced and attached to the various pleadings of record) indicates that the six counts of mail fraud were not all predicated upon the allegation that Joseph Alberici engaged in or procured arson as a condition precedent to the jury returning a verdict of guilty for mail fraud.[5]

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[5] The relevant portions of the federal indictment appear in Exhibit "A" of the April 2, 1990, motion for summary judgment filed by the defendants; to-wit:

INDICTMENT

COUNT ONE

THE GRAND JURY CHARGES THAT:

1. At all times relevant to this Indictment, the Jerry Lewis Theatre (hereinafter "the theatre") was a structure located at 247 Concord Road, Aston, Pennsylvania.

2. On or about May 9, 1977, defendant

JOSEPH ALBERICI

entered into an agreement to purchase the theatre for $210,000.

For example, Paragraph 4(A)-(G) averred a scheme by Alberici to obtain money by false and fraudulent

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3. The purchase agreement referred to in paragraph 2, above, required defendant

JOSEPH ALBERICI

to make an initial 10% ($21,000) down payment, to enter into a 20 year mortgage in the amount of $100,000 at 9% interest, and to make a further down payment of $89,000 on the date of closing, August 10, 1977.

4. From in or about May 1977, through on or about September 5, 1980, defendant

JOSEPH ALBERICI

did devise a scheme and artifice to defraud and to obtain money by means of false and fraudulent pretenses and representations, well knowing at the time that the pretenses and representations would be and were false and fraudulent when made, which scheme is set out more fully as follows:

(A). It was a part of this scheme that on or about May 14, 1977, defendant

JOSEPH ALBERICI

would and did purchase a $100,000 fire insurance policy on the theatre from the Safeguard Mutual Insurance Company. This policy was to expire on August 14, 1977.

(B). It was further a part of this scheme that on or about July 15, 1977, defendant

JOSEPH ALBERICI

would and did purchase a $100,000 fire insurance policy on the theatre through the Insurance Placement Facility of Pennsylvania. This policy was to expire on July 15, 1978.

pretenses, one facet of which was to purchase insurance in varying amounts from the defendants. Paragraph

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(C). It was further part of this scheme that on or about July 25, 1977, defendant

JOSEPH ALBERICI

would and did purchase a $125,000 fire insurance policy on the theatre from the General Accident Insurance Company. This policy was to expire on July 25, 1978.

(D). It was further part of this scheme that on or about July 26, 1977, defendant

JOSEPH ALBERICI

would and did purchase a $75,000 fire insurance policy on the theatre from the Quaker State Mutual Group Insurance Company. This policy was to expire on July 26, 1978.

(E). It was further part of this scheme that on or about July 26, 1977, defendant

JOSEPH ALBERICI

would and did purchase a $75,000 fire insurance policy on the theatre from the Eastern Mutual Company. This policy was to expire on July 26, 1978.

(F). It was further part of this scheme that on or about August 2, 1977, defendant

JOSEPH ALBERICI

would and did purchase a $25,000 contents insurance policy from Safeguard Mutual Insurance Company. This policy was to expire on July 26, 1980.

(G). It was further part of this scheme that all of the policies set out in subparagraphs (A) through (F), above, would be and were in fact in effect on August 6, 1977.

4(H)-(N) claimed Alberici solicited the aid of and compensated certain individuals to cause the arson of the

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(H). It as further part of this scheme that on July 28, 1977 defendant

JOSEPH ALBERICI

would and did place a telephone call to Joseph DiTizio for the purpose of asking Joseph DiTizio would and did contact Charles Allen for the purpose of enlisting his help in setting fire to the Jerry Lewis Theatre.

(I). It was further part of this scheme that on or about July 28, 1977, Joseph DiTizio would and did contact Charles Allen for the purpose of enlisting his help in setting fire to the Jerry Lewis Theatre.

(J). It was further part of this scheme that on or about July 28, 1977, Charles Allen would and did contact Vincent Fardella, a/k/a Vincent Mayo, for the purpose of enlisting his help in setting fire to the Jerry Lewis Theatre.

(K). It was further part of this scheme that on or about August 4, 1977, Charles Allen and Vincent Fardella would and did purchase naphtha for the purpose of using it to set fire to the theatre.

(L). It was further part of this scheme that on August 6, 1977, Charles Allen, Vincent Fardella, and Joseph DiTizio would and did travel to the Jerry Lewis Theatre and unload acid and naphtha into the theatre.

(M). It was further part of this scheme that on August 6, 1977, Charles Allen and Vincent Fardella would and did splash naphtha and acid throughout the interior of the Jerry Lewis Theatre and set it on fire.

property insured. Paragraph 4(P)-(Q) provided that Alberici caused proofs of loss, to obtain proceeds for the

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(N). It was further part of this scheme that defendant

JOSEPH ALBERICI

would and did pay a sum of money to Joseph DiTizio for his role in procuring the fire.

(O). It was further part of this scheme that on or about October 31, 1977, defendant

JOSEPH ALBERICI

would and did retain the services of the Young Adjustment Company to assist in the adjustment of his insurance claims arising from loss by fire of the theatre.

(P). It was further part of this scheme that defendant

JOSEPH ALBERICI

through the Young Adjustment Company, for the purpose of collecting insurance proceeds for the damage done by the theatre fire, would and did cause proofs of loss, executed by the defendant, to be forwarded to the Insurance Placement Facility of Pennsylvania, the General Accident Insurance Company, and Safeguard Mutual Insurance Company.

(Q). It was further part of this scheme that defendant

JOSEPH ALBERICI

would and did by the means described in paragraph (P), above, attempt to collect $214,244 for loss and damage to the theatre caused by fire.

damage done by the fire, to be forwarded to three of the defendants (i.e., Insurance Placement Facility of Pennsylvania, the General Accident Insurance Company, and Safeguard Mutual Insurance Company) in an attempt to collect $214,244.00 in damages. In Paragraph 4(R), the proofs of loss listed the fire as "unknown to insureds".

Except for Paragraph 4(H)-(N), none of the theories of fraud required any finding of arson on Alberici's part in order to find him guilty. Because there were alleged alternative theories of culpability which were mutually exclusive with regard to the allegation of arson, we conclude that the averment of arson was not essential to the jury's verdict. *Harter*, supra. As a result, Alberici's conviction of mail fraud could not have been received as conclusive proof of his guilt of arson.

However, although *Harter*, supra, did prohibit the reliance on a conviction of mail fraud as conclusive proof of the appellant's guilt of arson (where there were multiple theories of fraud aside from arson) to bar recovery by a defendant on any related insurance policy, the Court

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(R). It was further a part of this scheme that on the sworn statements in the proofs of loss described in paragraph (P), above, defendant

JOSEPH ALBERICI

would and did represent that the cause of the loss and damage occasioned by the August 6, 1977 fire "was unknown to insureds," which representations were false and fraudulent in that defendant

JOSEPH ALBERICI

had created a scheme to cause the fire and had performed acts in furtherance of that scheme.

did acknowledge that the inclusion of an anti-fraud clause in a policy of insurance would deny an insured recoupment of the proceeds of the policy in a civil suit if he/she engaged in any fraud or material misrepresentation touching any matter related to the insurance, *whether before of after the loss.* ___ Pa.Super at ___, 562 A.2d at 337, citing *Allegro v. Rural Valley Mutual Fire Insurance Co.*, 268 Pa. 333, 112 A. 140 (1920). We find the instant suit to be just such a case.

Once the jury returned a verdict of guilty on all six counts at Joseph Alberici's mail fraud trial, the United States District Court for the Eastern District of Pennsylvania granted Alberici's motion for a new trial on all but Count V of the federal indictment, one act of delivering materials connected with his fraudulent scheme to secure insurance proceeds from the defendants. Count V reads:

> THE GRAND JURY FURTHER CHARGES THAT:
>
> 1. Paragraphs 1 through 4 of count One are hereby incorporated by reference.
>
> 2. On or about January 23, 1978, the defendant
>
> JOSEPH ALBERICI
>
> in the Eastern District of Pennsylvania, having devised this scheme, for the purpose of executing this scheme to defraud and attempting to do so, did knowingly and willfully cause to be delivered by mail, according to the directions thereon, a letter containing schedules of value and loss, for a fire loss on August 6, 1977, at 247 Concord Road, Aston Township, Pennsylvania, which letter was addressed to Mr. Steven F.

Derrung[6] Curly Adjustment Company, 306 Walnut Street, Philadelphia, Pennsylvania 19106.

In violation of Title 18, United States Code, Section 1341.

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[6] To the extent Alberici assails the entry of the motion for summary judgment by allegations that no one by the name of Steven F. Derrung exists or worked for the company named in the indictment, this forum is an inappropriate place to contest the federal conviction, which Alberici is attempting to do from a fair reading of his pleadings, absent proof of fraud, perjury or some form of error now sufficient to invalidate the conviction. This appears unlikely since he has appealed his conviction and judgment of sentence to the Third Circuit Court of Appeals and the United States Supreme Court to no avail. Consequently, he will be prohibited from doing so in the court below under the cloak of a summary judgment challenge. As much was stated by our Supreme Court in *Hurtt v. Stirone*, 416 Pa. 493, 206 A.2d 624 (1965); to-wit:

> The defendant was presented with more than ample opportunity to overcome the charges lodged against him while he was swathed in a cloak of presumed innocence. His case was twice presented to a federal jury which found him guilty of extortion beyond a reasonable doubt, upon the same facts which are now urged as the basis for his civil liability. To now hold that the effect of those jury determinations is *nil* not only would be to fly i the face of reason, but also would be a general indictment of the whole American jury system. We are not now prepared to say that the mere technical effect not now prepared to say that the mere technical effect of the doctrines of res judicata and collateral estoppel regarding identity of parties is sufficient to overcome the policy which requires us to give conclusive effect to the prior conviction herein. The defendant should not now be heard to deny that which was established by his prior criminal conviction, without proof that his conviction was procured

See Exhibit "A" of the Defendnts' Cross Motion For Summary Judgment at page 10.

Of necessity, in order to make sense of the "scheme" attributed to Joseph Alberici, one needs to be cognizant of the facts mentioned in paragraphs 1 through 4 of Count I. Otherwise, the mere fact that Alberici was charged with having delivered by mail to a Mr. Steven F. Derrung schedules of loss tied to the fire would not in and of itself constitute a violation of the mail fraud statute.[7] Accordingly, paragraphs 1-4 of Count I, incorporated by reference into Count V, portrays Joseph Alberici

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> by fraud, perjury or some manner of error now sufficient to upset the conviction itself. Defendant has had his day in court and has failed to instill even a reasonable doubt in the collective mind of his then jury. No valid reason exists why he should be given a chance to try his luck with another jury.

416 Pa. at 498-499, 206 A.2d at ___.

[7] Federal statue requires specifically that a "scheme" be devised to defraud and the mails be utilized in furtherance of the artifice to constitute a contravention of the legislation; to-wit:

> § 1341. Frauds and swindles
>
> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly

as one who devised a scheme to defraud the defendants/ insurers of money and took steps in the implementation thereof; namely: insurance coverage on a building and its contents was purchased from the defendants, Paragraphs 1-4(A)-(F); three named individuals were enlisted and paid by Alberici to set fire to the property, Paragraphs 4(H)-(N); a company (Curly or Curley Adjustment[8] was retained by Alberici to assist him in collecting insurance proceeds and to serve as a conduit through which proofs of loss would be funnelled to three of the five insurance companies, Paragraph 4(O)-(P); an attempt was made to collect $214,244.00 for loss and damage to the building consumed by a fire, Paragraph 4(q); and, lastly, the proofs of loss represented that the cause of the fire "was unknown to insureds", Paragraph 4(R).

> causes to be delivered by mail which it is directed to be delivered by the person to whom it is addressed, any such matter or things, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

As amended August 12, 1970, Pub.L. 91-375, § 6(j)(12), 84 Stat. 778, 18 U.S.C. §1341 (Supp. 1989); see also 18 U.S.C. §1346 for definition of "scheme or artifice to defraud".

[8] Alberici urges in his pleadings and his appellate brief that there was no such company as "Curly" Adjustment. This spelling appears in the federal indictment. His attempt to undermine the grant of the motion for a summary judgment on this ground is the inappropriate forum to make such an allegation, absent fraud, perjury or some form of error now sufficient to invalidate the federal conviction. See note 6, supra. This burden has not been satisfied and its lack thereof dispenses with the need to respond to Alberici's contention with regard to the "Curly" nomenclature.

From our review of the record, we conclude that there were sufficient facts alleged in the federal indictment, in particular Paragraphs 1-4 of Count I and Count V, to sustain the jury's verdict of guilt for mail fraud for Alberici's scheme to use the mails to defraud the insurers by submitting fallacious claims misrepresenting the cause of a fire which damaged property insured by the defendants. Cf. *Com., Dept. of Transp. v. Mitchell*, ___ Pa. ___, 535 A.2d 581, 585 (1987) (it is well-settled that a conviction following a jury trial, like a plea of guilty, constitutes an admission of all facts averred in the indictment).

The District Court (per Pollock, J.), on this exact point, wrote in response to Alberici's request for post-trial relief that:

> I conclude that the jury, without question, would have found defendant [Joseph Alberici] guilty under count 5 had it been properly charged that it must be satisfied beyond a reasonable doubt that government exhibit 12 was delivered. The error that occurred [in charging the jury under the mail fraud statute in terms of "mailing" rather than "delivery", as appeared in the language of the grand jury's indictment], therefore, was harmless.
>
> Although I have found that the evidence adducted by the Government would have yielded a verdict of guilty only under count 5, it bears repeating that in any judgment the evidence would have been sufficient to support a verdict of guilty under the other counts as well had the jury been properly instructed. Wherefore, defendant's motion for a judgment of acquittal for lack of sufficient evidence will be denied. The other grounds relied upon by

defendant in challenging his conviction are without merit, and, therefore, denied.

CONCLUSION

Accordingly, in the accompanying Order, (1) this court's Order of July 25, 1983 granting a new trial is vacated with respect to count five only, and as to that count the jury's verdict of guilty is reinstated; and (2) defendant's motion for a judgment of acquittal and his alternative motion for a new trial are denied.

See Exhibit "F" at A-24 of Plaintiff Theresa Alberici's Motion for Partial Summary Judgment.

Therefore, consistent with our Supreme Court's admonition that "once there is a finding of guilty by a jury or judge, collateral attack upon such a finding will not be allowed unless it is established that the conviction was procured by fraud, perjury or some manner of error sufficient to upset the conviction," see *Folino v. Young*, ___ Pa. ___, 568 A.2d 171, 173 (1990), we decline Alberici's invitation (as evidence in his pleadings and appellate brief) to avail him the occasion to relitigate his conviction for mail fraud in a civil forum. Id. at ___, 568 A.2d at 174, wherein the Supreme Court agreed with Superior Court's decision to reverse and remand a judgment entered in appellant's favor to allow the trial court to enter a directed verdict against the appellant for his negligence in causing a death in a vehicular accident. The negligence was provable by the admission of the appellant's criminal conviction for driving at an unsafe speed.

As for the appellant's protestation in *Folino*, supra, that the introduction of his criminal conviction precluded

him from presenting evidence of justification or excuse for his violation of the statute, the Supreme Court disagreed and ruled that the trial court erred as a matter of law in submitting the question of the appellant's negligence to the jury. The appellant's criminal conviction established that he was negligent per se for civil-suit purposes. Id.; see also *Hurtt v. Strong*, 416 Pa. 493, 206 A.2d 624 (1965), cert. denied, 381 U.S. 925, 85 S.Ct. 1561, 14 L.Ed.2d 684 (1965) (felony and misdemeanor convictions can be introduced as conclusive evidence at a subsequent civil proceeding); *Burger King v. W.C.A.B.*, ___ Pa.Cmwlth. ___, 579 A.2d 1013, 1015-1016 (1990) (when a summary offense conviction is a necessary element of a felony or misdemeanor conviction, it can be introduced at administrative hearings as conclusive evidence).

As for Alberici's argument that the identification of just three of the five insurers in the federal indictment (see Count I, Paragraph 4(P)) as the objects of the scheme to defraud (having mail delivered) inhibited the remaining (unnamed) insurers from invoking the doctrine of collateral estoppel in their motion for summary judgment to bar him from collecting under any policies of insurance, we find the same to be meritless.

> Collateral estoppel applies only to issues already resolved by a previous action. "[F]or the doctrine of collateral estoppel to apply it must appear that the fact or facts at issue in both instances were identical; that these facts were essential to the first judgment and were actually litigated in the first cause." *"There is no requirement that there be an identity of parties in the two actions in order to invoke the bar." Collateral estoppel may be used as either a sword or a shield by a*

> *stranger to the prior action if the party against whom the doctrine is being asserted was either a party or in privity with the party in the prior action.*

Harter, supra, ___ Pa.Super. at ___, 562 A.2d at 355 (Citations omitted; emphasis added).

Even assuming, *arguendo*, that Quaker State Mutual Group and Home Mutual Insurance Company of Pennsylvania were not named parties to the federal suit, the fact that Joseph Alberici was convicted of mail fraud in his scheme to defraud insurers as to property carrying multiple coverage, two of which were issued by Quaker State and Home Mutual, would not prohibit the two from raising the doctrine of collateral estoppel in their motion for summary judgment to insulate them from liability to Joseph Alberici. Id. Such a defense arises from the inclusion of an anti-fraud clause in five of the six policies issued to Joseph Alberici; each reads:

> Concealment, fraud. This entire policy shall be void if, *whether before or after a loss*, the insured has willfully concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof, or the interest of the insured therein, or in case of any fraud or false swearing by the insured relating thereto.

See Complaint in Assumpsit, Exhibits "A", "C", "D", "E" & "F" (Emphasis added). Thus, contrary to Joseph Alberici's contention that the anti-fraud clause encompasses only *fraud in the inducement*, the invocation of the anti-fraud clause as written (with the verbiage "whether before or after a loss") is appropriate to embrace his

conviction for mail fraud. Contrast *Harter*, supra. Accordingly, we do not find fault with the grant of the defendants' motion for summary judgment on five of the six policies issued to the plaintiff Joseph Alberici under the anti-fraud clause argument. However, the same rationale cannot be relied upon with regard to the sixth policy (Safeguard Mutual Insurance Co. at No. F62-13513) covering the contents of the building burned for $25,000.00; contains no anti-fraud clause language as required by statute (40 P.S. § 636). Even the defendants concede as much:

> Five of the six policies here in issue contain the statutorily prescribed [anti-fraud] language, and it can safely be assumed that the sixth does also.
>
> * * *
>
> Five of the six policies clearly contain language providing that the entire policy will be rendered void by fraud and false swearing which occurs before or after the loss. * * * [S]ince it [i]s . . . recognized that the language employed in five of the six policies here at issue is effective to void those policies, there is little doubt that summary judgment must be granted in favor of defendants, at least on the five policies clearly containing the anti-fraud provisions.[3]

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[3] It can safely be assumed that if the entire policy was available, it also would have the required statutory language, thereby indicating that summary judgment was properly entered on that policy, as well.

Appellants' Brief at 17, 19-20 & n. 3. With the absence of the portion of Safeguard's policy indicating that it did

contain the anti-fraud clause, we may not "assume" that the language prevented Alberici from recovering. To do so would be pure speculation. Nonetheless, we may still deny Joseph Alberici any proceeds from the Safeguard policy No. F62-13513 for to do so "gives full effect to 'the common law principle that a person will not be permitted to profit by his own wrong, particularly his own crime.' " *Giacobetti v. Insurance Placement Facility of Pa.*, ___ Pa. ___, 457 A.2d 853, 857 (1983). Accord *Maravich v. Aetna Life and Casualty Co.*, ___ Pa.Super. ___, 504 A.2d 896, 907-908 (1986).

The second and third issues claim that the failure of the insurers to produce the federal record of Joseph Alberici's conviction was violative of *Harter*, supra, and impaired the court's ability to examine documents which would have shown that Alberici was not convicted of arson and that there was no evidence of mail fraud. We disagree.

We find the record to be more than adequate for us to assess the substance of what transpired in federal court. Secondly, the conclusiveness of the federal conviction, absent its procurement by fraud, perjury or some manner of error warranting its reversal, forecloses us from inquiring into the sufficiency of the evidence. See generally *Hurtt*, supra; *Harter*, supra.

The fourth and fifth issues proffered assert that Theresa Alberici was an innocent co-insured, with an insurable interest in the property, entitling her to benefit from the policies covering the damaged property.

> As a general rule, whether an innocent co-insured will be allowed to recover on a fire

> insurance policy after another co-insured has intentionally burned the insured property depends on whether the interests of the co-insureds are joint or severable. A majority of courts . . . have made this determination, i.e., whether the interests of co-insureds are joint or severable, by examining the terms of the contract of insurance to determine the nature of the coverage provided.

Maravich, supra, ___ Pa.Super. at ___, 504 A.2d at 902 (Citations omitted).

More particularly, the *Maravich* Court decided that the exclusion clause[9] in the insurer's policy, issued to the husband and wife (Maravichs), did not void coverage to the wife for the husband's intentional burning of their house. Because the policy did not define the Maravichs' interest, other than listing their names as the insureds, the ambiguity in the language of the insurance contract, i.e., whether it was joint or severable, was resolved in favor of the insured so that the rights of the innocent spouse were considered separate from those of the spouse who intentionally burned jointly owned property.

> [With respect to a fire insurance policy covering the interests of more than one insured] 'there is

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[9] The relevant exclusion clause in the insurer's policy issued to the Maravichs provided as follows:

> We do not cover loss resulting directly or indirectly from:
>
> . . .
>
> 5. *Neglect*, meaning neglect of the *insured* to use all reasonable means to save and preserve property at and after the time of a loss, or when property is endangered by a Peril Insured Against.

> much to commend the view that unless the terms . . . [thereof] are plainly to the contrary . . . the obligation of the carrier should be considered several as to each person insured, and the fraud or misconduct of one insured should not bar recovery by the innocent coinsureds to the extent of their respective interests in the property involved.
>
> * * *
>
> [*Maravich* Court] adopt[ed] this reasoning[and found:] The insured in Aetna's policy was defined as husband and wife. The policy did not define whether the interests of husband and wife in the policy were joint and indivisible or separate. The exclusionary language did not unequivocally exclude coverage for an innocent spouse in the event the property was burned by one of them. We construe this ambiguity in favor of the insured. It was reasonable, under such a policy, that an innocent spouse would expect to be indemnified against a loss which, as to her was fortuitous, and which was not excluded and, therefore, covered by the terms of the policy.

Id. at ___, 504 A.2d at 906 (Citation omitted).

Instantly, four of the policies listed Theresa Alberici as a co-insured with her husband: Safeguard Mutual Insurance Co. policy No. F62-13513, General Accident Fire and Life Assurance Corporation, Ltd. policy No. 5-760-89, Quaker State Mutual Group policy No. F-3405, and Home Mutual Insurance Co. of Pa. policy No. 51864. Additionally, we have averments appearing in the pleadings of the plaintiffs/appellants that Theresa Alberici incurred debt and expended personal and joint funds

with her husband toward the purchase of the building ultimately insured. Further, Joseph Alberici repeatedly has held to the position that the use of the phrase "or his nominee" in the agreement of sale purchasing the property in question referred to his wife, Theresa. This was later confirmed at a corporate meeting formally identifying Theresa Alberici as the "nominee" to the agreement of sale.

We find that the issues with regard to Theresa Alberici's having an insurance interest in the property, at least as to those insurance policies in which here name does not appear, is factually at issue and, thus, should not have been made the object of a motion for summary judgment.[10]

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[10] Although it is true that a person may not recover on an insurance policy in the event of loss if he or she has no insurable interest in the property, Theresa Alberici's expenditure of money to purchase the property in question constitutes her holding "such [a] relation to the property that its destruction by the peril insured against involves pecuniary loss to [her]. . . . " *Commonwealth v. Rodenbaugh*, ___ Pa.Cmwlth. ___, 519 A.2d 555, 563 (1986). Since the question of the intent of her husband in identifying her as the "nominee" in the agreement of sale and her supposed expenditure of money to help buy the property are contested by the defendants, the matter was not ripe for a motion for summary judgment. On remand, a trial will be necessary to decide these matters. The defendants conceded as much in their May 20, 1988, Pre-Trial Report; it provides:

> Ownership of an insurance policy is a factual question which is determined by the totality of the circumstances. *McDivitt v. Pymatuming Mutual Fire Insurance Co.*, 302 Pa.Super. 130, 136, 449 A.2d 612, 615 (1982). The court must examine whose name the policy is in, who paid the premiums and from what funds, and whether the policy was held for the common benefit

With regard to the argument that allowing the wife/co-insured to recoup under the policies for her husband's intentional act of burning the structure would be violative of public policy preventing a person from benefitting from his own criminal act, an argument raised by the defendants here, the *Maravich* Court concluded the better view to be in favor of paying an innocent spouse absent evidence that she assisted in or approved the husband's wrongful conduct; to-wit:

> The evidence in th[e] case was that David Maravich had intentionally set the fire which damaged the home and contents owned by husband and wife as tenants by the entireties. There was no evidence that Donna Maravich had had prior knowledge of her husband's intention to burn their home or that she had assisted in any way in causing the fire. As to her, the fire was fortuitous. By allowing Aetna to retain one-half of the loss, we give effect to the common law principle that David Maravich should not be permitted to profit from his own wrong. There is no public policy consideration, however,

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of husband and wife. Id. at 135-137 (449 A.2d at 615-16).

. . . *As the testimony at trial will indicate,* Mrs. Alberici is not named on these policies, she did not pay any of the premiums which were required by the policies, and any premiums which were paid did not come out of marital assets.

Id. at page 17 (Emphasis added). In addition to the preceding requiring a trial forum to resolve the questions posed by the defendants, the presentment of evidence regarding the issue of the existence of an "insurable interest" by Theresa Alberici needs to be heard by a trier-of-fact.

> which prevents the innocent person from recovering the indemnity which Aetna had agreed to pay for the loss which she sustained. A mere family relationship with the arsonist is inadequate to defeat the recovery of such indemnity.

Id. at ___, 504 A.2d at 907-908. This result is in accord with *Giacobetti*, supra, wherein the Supreme Court permitted beneficiaries under a trust agreement to receive the proceeds of an insurance policy payable upon the destruction of property. This was so even though the trustee had intentionally set fire to the property *and the policy had a "concealment, Fraud" provision* identical to the one at bar.[11]

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[11] The provision reads: "This entire policy shall be void if, whether before or after a loss, *the insured* has willfully concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof, or the interest of the insured therein, or in case of any fraud or false swearing by the insured relating thereto."

Even if we were to hold that the Court in *Giacobetti*, supra, did not paint with such a broad brush so as to permit the innocent co-insured to recover in spite of another co-insured's criminal conduct with regard to the property insured, there is federal case law which holds that a policy exclusion voided the policy upon the commission of a wrongful act by "any insured", in contradistinction to the language "the insured" which is not as inclusive. See *Spezialetti v. Pacific Employers Insurance Co.*, 759 F.2d 1139 (3rd Cir. 1985). The latter phrase being the one present in the case at bar, and there being no indication in the contracts of insurance as to how the named insured (Joseph and Theresa Alberici) were to consider their interests (joint or severable), case law dictates that:

> ' . . . unless the terms . . . [of a fire insurance policy covering the interests of more than one insured] are plainly to the contrary . . . the obligation of the carrier should be considered several as to each person

In doing so, the Court articulated its position thusly:

> Although appellee[/insurer] has not pressed its contention, raised in new matter, that it is not liable to the Trust under the "Concealment, Fraud" and the "Perils Not Included" clauses of the standardized policy, we conclude that, in any event, neither clause permits appellee to deny insurance proceeds to the Trust. The conduct of Harry Kracoff[/co-trustee/insured, who set fire to the insured property,] was wholly unilateral and in no way may be deemed to be an act of the Trust itself[so as to deny the proceeds from the fire insurance policy to the other named beneficiaries, but not including Kracoff's "children or issue" who where also beneficiaries under the Trust because they were the natural objects of his bounty.]

Id. at ___ 457 A.2d at 857. To the extent that the parties to the suit are preoccupied with whether the existence of the phrase "the insured" or "any insured" in the anti-fraud clause of the policies of insurance is pivotal to the determination of the case, *Giacobetti* would appear to resolve the question in favor of permitting an innocent co-insured recovery regardless of the phraseology in the anti-fraud clause.

For the reasons above-stated, we find all of the appellants' claims to be meritless save for those relating to the rights of the appellant/Theresa Alberici to recover under

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> insured, and the fraud or misconduct of one insured should not bar recovery by the innocent coinsureds to the extent of their respective interests in the property.'

Maravich, supra, ___ Pa.Super. at ___, 504 A.2d at 906 (citations omitted).

the policies, which she averred in the pleadings to being an innocent-co-insured in a building for which she incurred debt and expended joint funds with her husband to purchase.[12]

Accordingly, we reverse that portion of the order of March 14, 1990, granting summary judgment against appellant/Theresa Alberici; the portion of the same order entering judgment against the appellant/Joseph Alberici is affirmed.

Order affirmed in part, reversed in part and the case is remanded for proceedings consistent with this memorandum opinion. Jurisdiction is relinquished.

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[12] The appellants' sixth issue charges that the entire Court of Common Pleas of Delaware County should be disqualified from hearing their case and a change of venue should be granted. Suffice it to say, we read the record relating to this claim and find it totally lacking in merit. In addition, we would note that Judge Koudelis, in his opinion dated September 7, 1990, at pages 3-14, justified his denial of the appellants' motion for disqualification and change of venue. We find the discussion therein a proper response to the motion.

EXHIBIT B

IN THE COURT OF COMMON PLEAS OF
DELAWARE COUNTY, PENNSYLVANIA

CIVIL ACTION – LAW

JOSEPH ALBERICI and THERESA ALBERICI, his wife	:	No. 78-10515
v.	:	
SAFEGUARD MUTUAL INSURANCE COMPANY, GENERAL ACCIDENT FIRE AND LIFE ASSURANCE CORPORATION, LTD., THE INSURANCE PLACEMENT FACILITY OF PA., QUAKER STATE MUTUAL GROUP AND HOME MUTUAL INSURANCE COMPANY OF PA.	:	

Edward Harkin, Esquire, Attorney for the Plaintiffs Hugh M. Emory, Esquire, Attorney for the Defendants

OPINION

LABRUM, J. FILED: 2-7-91

This matter arose out of claims brought by the Plaintiffs, Joseph and Theresa Alberici under six separate policies of insurance issued by the Defendant insurers. The claims resulted from an incendiary fire which occurred on August 6, 1977 at premises located at 247 Concord Road, Aston, Delaware County, Pennsylvania, known as the Jerry Lewis Theatre. In the most recent action before this Court Defendants filed a Motion for Summary Judgment and on October 4, 1990 this Court entered an Order

granting Judgment in favor of the various Defendants and against the Plaintiffs. Plaintiffs have appealed to the Superior Court.

After the fire of August 6, 1977, Joseph Alberici submitted claims for damage to the building located at 247 Concord Road to the various Defendants, representing under oath and in sworn statements of proof of loss, that the cause and origin of the fire in question was unknown and that he was not involved in procuring the incendiary fire.

Mr. Alberici was subsequently indicted for fraud in using the United States mail to claim insurance benifits for the fire from the Defendants. Mr. Alberici was convicted of one (1) count of the indictment by a jury in the United States District Court for the Eastern District of Pennsylvania. The conviction was affirmed by the United States Court of Appeals for the Third Circuit.

Of the six subject policies sued upon by the Plaintiffs, four insured against damage to the Theatre Building and two insured against damage to the building's contents. Five of the policies contained a provision which stated, as follows:

> This entire policy shall be void if, whether before or after the loss, the insured has willfully concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof, or the interest of the insured therein, or in case of any fraud or false swearing by the insured relating thereto.

The Pennsylvania Legislature requires this provision to be included in all fire insurance policies issued within

the Commonwealth. *40 P.S. 636.* At the time of the loss, Joseph Alberici was the named insured on all of the policies sued upon by the Plaintiffs. Theresa Alberici was a named insured on three of the six policies issued to the Plaintiffs.

In the Federal indictment, Joseph Alberici was accused of hiring arsonists to burn the Theatre Building, providing the arsonists with an opportunity to enter the premises and attempting to collect the fire insurance proceeds after the fire. Mr. Alberici allegedly employed the United States Mails in his attempt to collect the insurance proceeds. As previously stated, a conviction followed the indictment.

At the time of the fire, the Plaintiffs' interests in the property was based on an Agreement of Sale between Joseph Alberici and prior owners. The buyer indicated on the Agreement was Joseph Alberici or "his nominee." The name of Theresa Alberici did not appear in the Agreement of Sale. Additionally, Joseph Alberici testified that he intended that the subject property would ultimately be titled in the name of a corporation formed after the Agreement of Sale was executed.

Defendants filed a Motion for Summary Judgment alleging Joseph Alberici's involvement in the arson, which resulted in a granting of Summary Judgment in favor of all Defendants and against Plaintiffs. That Order was appealed to the Pennsylvania Superior Court, and the Superior Court reversed the trial Court. Although the Superior Court reversed as to all Plaintiffs and all Defendants, the Court's Opinion questioned and was directed to the status of Mrs. Alberici's claim. However, because

the appellate court reversed the Summary Judgment as to all Plaintiffs, the Plaintiffs have argued in the present matter that Mr. Alberici's claim was still undetermined.

After a review of the Motions for Summary Judgment, testimony presented in the matter and briefs and arguments of counsel, the Court entered an Order of October 4, 1990 granting Summary Judgment in favor of all Defendants. A copy of the said Orders is attached as an addendum to the Opinion. As stated in the Order, the Court determined that Mr. Alberici's fraud and role in procuring the arson had been conclusively determined by his conviction of mail fraud and therefore that the policies in question were void. Joseph Alberici's conviction for mail fraud precluded his recovery under any of the policies at issue in this case. The Federal jury determined that Mr. Alberici had participated in procuring the fire which caused the loss. Accordingly, he must be precluded under the theory that one who commits or procures arson may not recover from insurance on the property that has been burned. Additionally, the evidence established his fraudulent submissions of claims under the fire insurance policies. Under each of the policies, any showing of fraud would be sufficient to void the policies.

The law is clear that a criminal conviction of an insured for arson or fraud in connection with a fire loss claim constitutes an absolute bar to the right of the insured to recover damages under a policy of insurance in a civil action. *Harter v. Reliance Ins. Co.*, 386 Pa.Super 14, 562 A.2d 330 (1989). Additionally, the General Assembly enacted a Standard Fire Insurance Policy, 40 P.S. 636 Supra, which provided that the policy will be voided in the case of any fraud or false swearing by the insured

relating to the policy of fire insurance. This language, which was specifically stated in five of the six policies at issue, stated that the policies would be voided by fraud or false swearing occurring either before or after the loss.

This Court further ruled that Mrs. Alberici was not named insured on any of the policies, did not have an insurable interest in the property and that equitable principles would not permit Mrs. Alberici to profit from the fraud and illegal conduct of her husband.

Fraudulent burning of an insured premises precluded recovery under an insurance policy by all insureds. *Bowers Company v. London Assurance Group Corporation,* 90 Pa.Super 121 (1926). This Court is aware that situations have been presented wherein the Courts have held that the wrongful conduct of co-fiduciaries did not preclude recovery by beneficiaries of a trust, *Giacobetti v. Insurance Placement Facility of Pennsylvania,* 500 Pa. 447, 457 A.2d 853 (1983), and that recovery under a fire insurance policy was allowed for a co-insured's spouse where it had been determined that the spouse's husband had fraudulently burned the insured premises. *Maravich v. Aetna Life and Casualty Company,* 350 Pa.Super 392, 504 A.2d 896 (1986).

The current state of the law has recently been stated by the United States Court of Appeals for the Third Circuit in the case of *Speziletti v. Pacific Employers Insurance Company,* 759 F.2d 1139 (3d Cir. 1985) in which the court stated:

> *Jiacobetti, Opat* and *Kelner* (citations omitted) demonstrate that an innocent co-insured is no longer automatically precluded from recovery

> as a matter of law. It is fair to state that Pennsylvania now requires that the intent and relationship of the parties be established. If the facts in some cases establish that the underlining reason for denying coverage does not exist, under those circumstances it would be inequitable to apply an absolute bar. Although not expressed, the major concern of the cases denying recovering is the fear of collusion and fraud. Particularly in the husband and wife cases, an equally guilty spouse might recover policy proceeds because of the difficulty in proving participation in or knowledge of the arson committed by the other spouse.
>
> (P.1141)

While an innocent co-insured spouse is not automatically precluded from recovery, such a spouse may be precluded, upon a showing of involvement in fraudulent burning of the premises or if it is shown that due to the material relationship, the party procuring the fraud will benefit by an award of insurance proceeds to the other spouse.

In the present case, the Plaintiffs remain married, continue to live together and have at all times remained united in this litigation. An award of insurance proceeds to Mrs. Alberici in this case would permit Mr. Alberici to enjoy indirectly, a benefit which the law prohibits him from enjoying directly. For these reasons the Court denied Mrs. Alberici's ability to recover the proceeds under the policies.

Theresa Alberici was precluded from recovery under the policies because she never held an insurable interest in the subject premises.

Mrs. Alberici was listed as an insured on the policies of insurance issued by General Accident Fire and Life Assurance Corp., LTK., Quaker State Mutual Group and the Home Mutual Insurance Company of Pennsylvania. She was not listed as an insured on the policies issued by Insurance Placement Facility of Pennsylvania or Safeguard Insurance Company.

As previously stated, Theresa Alberici had no insurable interest in the Jerry Lewis Theatre. Since contracts of property insurance are personal contracts of indemnity, there can be no recovery if no loss is suffered. To recover under such a contract, a claimant must show both an existing contract of insurance and an insurable interest in the property. *Commonwealth v. Rodebaugh,* 102 Pa. Commonwealth Ct., 592, 519 A.2d 555 (1986). Furthermore, an interest based on a contingency does not create an insurable in real property. *Mut. Ben. Ins. v. Goschenhoppen Mut. Ins.,* 392 Pa. Super 363, 572 A.2d 1275 (1990).

Accordingly, no credible evidence was presented to indicate that Theresa Alberici had any legal or equitable interest in the property which would permit her to recover insurance proceeds under the policy.

Additionally, as previously stated in the matter of Joseph Alberici, Theresa Alberici was barred from recovering under the policies containing the anti-fraud provisions by virtue of Joseph Alberici's fraudulent submission of claims. Under the statute and policy language, any fraud or false swearing in connection with the fire insurance policies would void those policies. As such, none of the parties could recover under a void policy.

For all of the stated reasons, Summary Judgment was entered in favor of the Defendants and against the Plaintiffs.

BY THE COURT:

/s/ Joseph T. Labrum, Jr.
JOSEPH T. LABRUM, JR.,
JUDGE

EXHIBIT C

ISENBERG, GOLDIN & BLUMBERG
BY: M. Stuart Goldin
Identification No. 03937
Suite 623 – Four Penn Center Plaza
Philadelphia, PA. 19103
(215) 667-7760

I HEREBY CERTIFY THAT THE WITHIN IS A TRUE AND CORRECT COPY OF THE ORIGINAL FILED IN THIS MATTER.

/s/ M. Stuart Goldin

Attorney for Plaintiffs

JOSEPH ALBERICI and THERESA ALBERICI, his wife
1101 Angora Ave., Yeadon, PA

vs.

SAFEGUARD MUTUAL INSURANCE COMPANY
1321 Arch St., Phila., PA

GENERAL ACCIDENT FIRE & LIFE ASSURANCE CORPORATION, LTD.
414 Walnut St., Phila., PA

THE INSURANCE PLACEMENT FACILITY OF PA
325 Chestnut St., Phila., PA

QUAKER STATE MUTUAL GROUP
14 East Main St., Allentown, PA

and

HOME MUTUAL INSURANCE COMPANY OF PA
407 Chestnut St., Emmaus, PA

DELAWARE COUNTY, PA
COURT OF COMMON PLEAS
TRIAL *DIVISION*
~~TERM~~

No. 78-10515

COMPLAINT IN ASSUMPSIT

NOTICE

You have been sued in court. If you wish to defend against the claims set forth in the following pages, you must take action within twenty (20) days after this complaint and notice are served, by entering a written appearance personally or by attorney and filing in writing with the court your defenses or objections to the claims set forth against you. You are warned that if you fail to do so the case may proceed without you and a judgment may be entered against you by the court without further notice for any money claimed in the complaint or for any other claim or relief requested by the plaintiff. You may lose money or property or other rights important to you.

YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE A LAWYER OR CANNOT AFFORD ONE, GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW TO FIND OUT WHERE YOU CAN GET LEGAL HELP.

Name	Delaware County Bar Association
Address	Front & Lemon Sts.
City	Media, PA 19063 Tel. No. LO 6-6627

1. Plaintiffs, Joseph Alberici and Theresa Alberici are husband and wife an reside in Yeadon, Delaware County, Pennsylvania.

2. Defendant Safeguard Mutual Insurance Company is a corporation at all relevant times authorized to engage in the fire insurance business in the Commonwealth of Pennsylvania.

3. Defendant General Accident Fire and Life Assurance Corporation, Ltd. is a corporation at all relevant times authorized to engage in the fire insurance business in the Commonwealth of Pennsylvania.

4. Defendant The Insurance Placement Facility of Pennsylvania is a corporation at all relevant times authorized to engage in the fire insurance business in the Commonwealth of Pennsylvania.

5. Defendant Quaker State Mutual Group is a group of corporations which at all relevant times was authorized to engage as a group in the fire insurance business in the Commonwealth of Pennsylvania.

6. Defendant Home Mutual Insurance Company of PA is a corporation at all relevant times authorized to engage in the fire insurance business in the Commonwealth of Pennsylvania.

7. On or about May 9, 1977, plaintiff Joseph Alberici entered into an Agreement of Sale to purchase premises 247 Concord Road, Aston, Pennsylvania, as well as the improvements, equipment and contents therein.

8. On or about May 27, 1977, defendant Safeguard Mutual Insurance Company, in consideration of the premium set forth therein, executed and delivered its policy of fire insurance insuring plaintiff Joseph Alberici against loss by fire to the building described therein. A copy of said policy, being number F 62-13709, is attached hereto, is made a part hereof and is marked Exhibit "A".

9. On or about August 22, 1977, effective August 2, 1977, defendant Safeguard Mutual Insurance Company,

in consideration of the premium set forth therein, executed and delivered its policy of fire insurance insuring plaintiffs Joseph Alberici and Theresa Alberici against loss by fire to the contents of said building described therein. A copy of said policy, being number F 62-13513, is attached hereto, is made a part hereof, and is marked Exhibit "B".

10. On or about July 26, 1977, defendant General Accident Fire and Life Assurance Corporation, Ltd., in consideration of the premium set forth therein, executed and delivered its policy of fire insurance insuring plaintiffs Joseph Alberici and Theresa Alberici against loss by fire to the building described therein. A copy of the memorandum of insurance (the original policy having been returned to said defendant) is attached hereto, is made a part hereof, and is marked Exhibit "C". Plaintiffs demand that a copy of the said policy be attached to the said defendant's Answer.

11. On or about July 15, 1977, defendant The Insurance Placement Facility of Pennsylvania, in consideration of the premium set forth therein, executed and delivered its policy of fire insurance insuring plaintiff Joseph Alberici against loss by fire to the building described therein. A copy of said policy, being number PFP 145326-70 is attached hereto, is made a part hereof, and is marked Exhibit "D".

12. On or about August 1, 1977, effective July 26, 1977, defendant Quaker State Mutual Group, in consideration of the premium set forth therein, executed and delivered its policy of fire insurance insuring plaintiffs Joseph Alberici and Theresa Alberici against loss by fire

to building and contents described therein. A copy of said policy, being number F 3405 is attached hereto, is made a part hereof, and is marked Exhibit "E".

13. On or about July 27, 1977, defendant Home Mutual Insurance Company of Pennsylvania, in consideration of the premium set forth therein executed and delivered its policy of fire insurance insuring plaintiffs Joseph Alberici and Theresa Alberici against loss by fire to building and contents described therein. A copy of said policy, being number 51864 is attached hereto, is made a part hereof, and is marked Exhibit "F".

14. On or about August 6, 1977, the said building, improvements, equipment and contents continued to be under Agreement of Sale to plaintiff Joseph Alberici or his nominee.

15. On or about August 6, 1977, said building, improvements, equipment and contents were damaged by fire.

16. The said fire damage was as follows:

(a) Building $214,244.00

A copy of the building damage is attached hereto as Exhibit "G".

(b) Contents 10,000.00

A copy of the contents damage is attached hereto as Exhibit "H".

17. The apportionment of the loss is as follows:

Building Loss

Company	Policy Amount	Pays
Safeguard	$100,000.00	$ 47,609.79
General Accident	$125,000.00	$ 57,512.12
Insurance Placement	$100,000.00	$ 47,609.79
Quaker State	$ 62,500.00	$ 29,756.15
Home Mutual	$ 62,500.00	$ 29,756.15
Total:	$450,000.00	$214,244.00

Contents Loss

Company	Policy Amount	Pays
Safeguard	$25,000.00	$ 5,000.00
Quaker State	$12,500.00	$ 2,500.00
Home Mutual	$12,500.00	$ 2,500.00
Total:	$50,000.00	$10,000.00

19. Plaintiffs have complied with the co-insurance requirements of the policies issued by the defendants.

COUNT I

JOSEPH ALBERICI vs. SAFEGUARD MUTUAL INSURANCE COMPANY

20. Plaintiff Joseph Alberici incorporates by reference paragraphs 1 through 19 inclusive of this complaint as fully as though set forth at length herein.

21. On or about August 6, 1977, the Safeguard policy, Exhibit "A" was in full force and effect.

22. Plaintiff Joseph Alberici has done and performed all and everything necessary for him to do and

perform as conditions precedent to the bringing of this suit.

23. Plaintiff Joseph Alberici has demanded of defendant Safeguard Mutual Insurance Company the sum of $47,609.79 for said building loss but said defendant has refused to pay the same.

24. Defendant Safeguard Mutual Insurance Company has denied all liability for said loss.

WHEREFORE, plaintiff Joseph Alberici demands judgment against defendant Safeguard Mutual Insurance Company for said building loss in the sum of $47,609.79 with interest and costs.

COUNT II

JOSEPH ALBERICI and THERESA ALBERICI vs. SAFEGUARD MUTUAL INSURANCE COMPANY

25. Plaintiffs Joseph Alberici and Theresa Alberici incorporate by reference paragraphs 1 through 19 inclusive of this Complaint as fully as though set forth at length herein.

26. On or about August 6, 1977, the Safeguard policy, Exhibit "B" was in full force and effect.

27. Plaintiffs have done and performed all and everything necessary for them to do and perform as conditions precedent to the bringing of this suit.

28. Plaintiffs have demanded of defendant Safeguard Mutual Insurance Company the sum of $5,000.00 for said contents loss but said defendant has refused to pay the same.

29. Defendant Safeguard Mutual Insurance Company has denied all liability for said loss.

WHEREFORE, plaintiffs Joseph Alberici and Theresa Alberici demand judgment against defendant Safeguard Mutual Insurance Company for said contents loss in the sum of $5,000.00 with interest and cost.

COUNT III

JOSEPH ALBERICI and THERESA ALBERICI vs. GENERAL ACCIDENT FIRE AND LIFE ASSURANCE CORP., LTD.

30. Plaintiffs Joseph Alberici and Theresa Alberici incorporate by reference paragraph 1 through 19 inclusive of this Complaint as fully as though set forth at length herein.

31. On or about August 6, 1977, the General Accident Fire and Life Assurance Corporation, Ltd. policy, Exhibit "C", was in full force and effect.

32. Plaintiffs have done and performed all and everything necessary for them to do and perform as conditions precedent to the bringing of this suit.

33. Plaintiffs have made demand of defendant General Accident Fire and Life Assurance Corporation, Ltd., in the sum of $57,512.12 for said building loss but the said defendant has refused to pay the same.

WHEREFORE, plaintiffs Joseph Alberici and Theresa Alberici demand judgment against defendant General Accident Fire and Life Assurance Corporation, Ltd. in the sum of $57,512.12 with interest and costs.

COUNT IV

JOSEPH ALBERICI vs. THE INSURANCE PLACEMENT FACILITY OF PA

34. Plaintiff Joseph Alberici incorporates by reference paragraphs 1 through 19 inclusive of this Complaint as fully as though set forth at length herein.

35. On or about August 6, 1977, the Insurance Placement Facility of Pennsylvania policy, Exhibit "D", was in full force and effect.

36. Plaintiff Joseph Alberici has done and performed all and everything necessary for him to do and perform as conditions precedent to the bringing of this suit.

37. Plaintiff Joseph Alberici has demanded of defendant The Insurance Placement Facility of Pennsylvania, the sum of $47,609.79 for said building loss but the said defendant has refused to pay the same.

WHEREFORE, Plaintiff Joseph Alberici demands judgment against defendant The Insurance Placement Facility of Pennsylvania in the sum of $47,609.79 with interest and costs.

COUNT V

JOSEPH ALBERICI and THERESA ALBERICI vs. QUAKER STATE MUTUAL GROUP

38. Plaintiffs Joseph Alberici and Theresa Alberici incorporate by reference paragraphs 1 through 19 inclusive of this Complaint as fully as though set forth at length herein.

39. On or about August 6, 1977, the Quaker State Mutual Group policy, Exhibit "E", was in full force and effect.

40. Plaintiffs have done and performed all and everything necessary for them to do and perform as conditions precedent to the bringing of this suit.

41. Plaintiffs have demanded of defendant Quaker State Mutual Group the sum of $32,256.15 consisting of $29,756.15 for building loss and $2,500.00 for contents loss, but said defendant has refused to pay the same.

42. Defendant Quaker State Mutual Group has denied all liability for said loss.

WHREFORE, plaintiffs Joseph Alberici and Theresa Alberici demand judgment against defendant Quaker State Mutual Group in the sum of $32,256.15.

COUNT VI

JOSEPH ALBERICI and THERESA ALBERICI vs. HOME MUTUAL INSURANCE CO. OF PA

43. Plaintiffs Joseph Alberici and Theresa Alberici incorporate by reference paragraphs 1 through 19 inclusive of this Complaint as fully as though set forth at length herein.

44. On or about August 6, 1977, the Home Mutual Insurance Company of PA policy, Exhibit "F", was in full force and effect.

45. Plaintiffs have done and performed all and everything necessary for them to do and perform as conditions precedent to the bringing of this suit.

46. Plaintiffs have demanded of defendant Home Mutual Insurance Company of PA in the sum of $32,256.15, consisting of $29,756.15 for building loss and $2,500.00 for contents loss, but said defendant has refused to pay the same.

47. Defendant Home Mutual Insurance Company of PA has denied all liability for said loss.

WHEREFORE, plaintiffs Joseph Alberici and Theresa Alberici demand judgment against defendant Home Mutual Insurance Company of PA in the sum of $32,256.15 with interest and costs.

COUNT VII

PLAINTIFFS JOSEPH ALBERICI and THERESA ALBERICI vs. SAFEGUARD MUTUAL INSURANCE COMPANY, GENERAL ACCIDENT FIRE AND LIFE ASSURANCE CORPORATION, LTD., THE INSURANCE PLACEMENT FACILITY OF PENNSYLVANIA, QUAKER STATE MUTUAL GROUP and HOME MUTUAL INSURANCE COMPANY OF PA

48. Plaintiffs Joseph Alberici and Theresa Alberici incorporate by reference paragraphs 1 through 47 inclusive of this Complaint as fully as though set forth at length herein.

49. The conduct of all of the defendants toward plaintiffs in the handling of the claim arising out of the fire loss has been oppressive and malicious, was calculated to harm and did cause plaintiffs financial damage and mental anguish and was in breach of defendants' implied covenants of good faith and fair dealing.

WHEREFORE, plaintiffs demand judgment against each defendant for consequential and punitive damages in an amount in excess of $10,000 as well as counsel fees and costs.

ISENBERG, GOLDIN &
BLUMBERG
BY: _____
Attorneys for Plaintiffs

COMMONWEALTH OF PENNSYLVANIA :
: SS.
CITY AND COUNTY OF PHILADELPHIA :

JOSEPH ALBERICI, having been duly sworn according to law, deposes and says that he is one of the plaintiffs in the within action and that the facts set forth in the within Complaint in Assumpsit are true and correct to the best of his knowledge, information and belief.

/s/ Joseph Alberici
JOSEPH ALBERICI

Sworn to and subscribed before me

this 11th day of July, 1978.

/s/ Joan Morse
Notary Public
Joan Morse
Notary Public, Philadelphia, Philadelphia Co.
My Commission Expires April 12, 1980

EXHIBIT D

STATEMENT OF QUESTIONS INVOLVED

As the Appellee failed to provide a transcript of the Federal criminal trial to the Court below for its review?

Not answered by the Court below.

Has the Court below failed to review the transcript of the Federal criminal trial as required by *Harter v. Reliance Ins. Co.*?

Not answered by the Court below.

Was there a finding of arson or the procuring of arson by Joseph Alberici's conviction of one count of mail fraud?

Answered in the affirmative by the Court below.

Was the conviction of mail fraud relevant to this action against the insurance companies?

Answered in the affirmative by the Court below.

Does Theresa Alberici have an insurable interest in the premises destroyed by fire?

Answered in the negative by the Court below.

Does the conviction of Joseph Alberici preclude his innocent spouse from collecting insurance proceeds?

Answered in the affirmative by the Court below.

Has the Court below shown bias and prejudice against Plaintiffs to preclude them from a fair trial?

Not answered by the Court below.

Supreme Court, U.S.
FILED
APR 1 1993
OFFICE OF THE CLERK

No. 92-1369

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

JOSEPH ALBERICI AND THERESA ALBERICI, H/W

v.

SAFEGUARD MUTUAL INSURANCE COMPANY, ET AL.

PRO SE PETITIONER JOSEPH ALBERICI'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

Joseph Alberici, PRO SE
1753 Marilyn Drive, Havertown, PA
(215) 789-1998

PARTIES TO THE PROCEEDING

Joseph Alberici and Theresa Alberici,

Petitioners

Safeguard Mutual Insurance Company

PA. Insurance Guaranty Association

General Accident Fire and Life Insurance Corp., LTD.

Insurance Placement Facility of Pennsylvania

Quaker State Mutual Insurance Group

Home Mutual Insurance Company of Pennsylvania

Respondents

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PRO SE PETITIONER JOSEPH ALBERICI'S

REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

ARGUMENT

On Saturday, March 20, 1993, pro se petitioner, Joseph Alberici, received Respondents' Brief in Opposition from the Cockle Printing Co., Omaha, Nebraska. In its TABLE OF CONTENTS, Respondents, at page iii, Section X, Subsection A, Subdivisions 2 and 3 state:

A. THIS COURT IS WITHOUT JURISDICTION TO ISSUE THE REQUESTED WRIT OF CERTIORARI.

1. . . . . .

2. There is no Substantial Federal Issue to be Determined by this Court.

3. Petitioners Failed to Raise Any Substantial Federal Issue in the Proceedings Below.

The COUNTERSTATEMENT OF GROUNDS ON WHICH JURISDICTION IS INVOKED (p. 2, paragraph VI) states:

> "Finally, an examination of the record in this case will reveal that Petitioner has failed, completely, to raise or preserve a substantial issue during the State Court proceedings. Only now, when confronted with the need to concoct some basis for this Court to exercise jurisdiction, has Petitioner come forward with the alleged constitutional violations of which he now complains. The failure to raise and preserve a Federal issue in the proceedings below precludes review of such issues here. As such, this Court is without jurisdiction to hear this case."

Petitioner disagrees with this assertion. It is misleading and untruthful. Plaintiffs have repeatedly raised Federal issue in the proceedings below. The issues

appear in Plaintiffs' Memorandum of Law on their Objections to the Defendant's Request for Admissions and Summary Judgments in the Lower Court. Plaintiffs'/Appellants' Briefs to the Pennsylvania Superior and Supreme Courts all indicate and state substantial Federal issues and constitutional violations. Memorandum of Law, Appendix A.

Respondents' COUNTERSTATEMENT OF THE CASE (Section VIII, page 3, second paragraph) states: After the fire, Mr. Alberici... submitted claims to the various insurers covering the fire risk. In sworn proofs of loss submitted to the insurers, Mr. Alberici stated that the cause of the fire was "unknown to insureds."

The fourth paragraph states: The indictment charged Mr. Alberici with engaging in a scheme to defraud his insurance companies by hiring arsonists to burn the movie theatre, so that he could recover the fire insurance proceeds from the policies covering the theatre.

The Federal Indictment against petitioner alleged in Count I paragraph (D) and (E) state that the Quaker State Mutual and Eastern Mutual Insurance Companies were part of the scheme. The record showed, however, that no claim was made by petitioner against either of these companies. At the Federal trial of petitioner, the arsonists, Charles Allen and Vincent Fardella, testified that petitioner allegedly hired only Joseph DiTizio to perform the alleged arson. Allen and Fardella stated that they did not know Alberici and never met the man. Although Quaker State Mutual and Eastern Mutual Insurance are named in the indictment scheme of Count I, petitioner was not indicted for filing claims against them. Instead, the Federal prosecutors deceitfully and wrongfully manipulated and indicted petitioner for Count V and Count VI for these two insurance companies, to which petitioner did not submit a proof of loss with "unknown to insureds" and a policy never existed with

Count V in the lower court.

By any stretch of the imagination, how can the indictment scheme of Count I incorporate a policy, sworn proof of loss (stating "unknown to insureds") when no policy or sworn proof of loss were ever attached to the Indictment, nor produced to the Grand Jury? How can Count V be supported without a document?

The above are new supplemental issues raised by Respondents to intentionally misrepresent and fraudulently lie.

In the sixth paragraph (page 4) Respondents state: "Meanwhile, the insurers, Respondents here, pleaded defenses of fraud and arson to the suit brought on the fire insurance policy. Interestingly, the insurers plead this four years before petitioner was indicted. If Respondents are allowed to use supplemental new issues not of record in the lower court after twelve (12) years, the petitioner should have the right to raise a new issue.

Respondents intentionally and deceitfully failed to mention that Counts I, II, III, IV and VI of the Federal Indictment which incorporate all the issues they raise for a defense were voluntarily dismissed by the Federal prosecutors and Judge Pollak without petitioner's input or knowledge. Petitioner's counsel, the Federal Prosecutors and the Judge suppressed from petitioner the dismissal of these five counts on October 11, 1985. In fact, petitioner was repeatedly directing his attorney to press for a new trial. Petitioner did not discover the dismissal until sometime in 1987 when he reviewed the Court docket and records at the Federal Courthouse. Thus, petitioner is innocent of these charges, the indictment and its scheme.

Moreover, the document introduced to support Count V is a despicable, intangible and irrelevant document which was deceitfully and fraudulently substituted at trial with a different fabricated and intangible document;

Exhibit 12 which bears on it a false and fraudulent "Received" stamp that erroneously and fatally convicted and sentenced petitioner. Additionally, neither Count V or Exhibit 12 contained any documents or words stating policy, concealment of fraud, sworn proofs of loss, or "unknown to insureds" in the mail fraud case or the civil case.

Respondents used these lying, false and fraudulent words on April 2, 1990 in their Cross-Motion for Summary Judgment, Memorandum of Law filed five and one-half months later on August 27, 1990 in violation of Local Rules, Pennsylvania Superior and Supreme Court Rules of Appellate Procedure. This was intentionally done to dupe the Courts for a favorable decision.

Now, the Respondents are attempting to mislead this Honorable Court into believing their lies. Respondents in their Appendix have introduced Exhibits A, B and C to help prove their defense on Count V. It makes common sense that if a policy, proof of loss

or "unknown to insureds" their main defensive argument existed in the lower court record No. 78-10515, Respondents surely would have also introduced them as exhibits. In doing this, they would have avoided this expensive, aggravating hassle and unusual delay. At the very least, they could have submitted an affidavit or verification to substantiate their argument. But, Respondents have no evidence whatsoever to substantiate their false defensive argument.

The strange, suspicious and unusual part of this is that petitioner filed a Pennsylvania "Black Letter Law" Motion to Strike Respondents' Supplemental Reproduced Record and Portion of Respondents' Brief on June 3, 1991. The Motion was hastily denied by the Superior Court of Pennsylvania, Per Curiam, within seven (7) days on June 10, 1991, without even waiting for Respondents to answer, which they intentionally refused to do. Pennsylvania Rules of Civil Procedure, Rule 123(b) requires the filing of an Answer

within seven (7) days of service. Petitioner's attorney intentionally suppressed the Order of Denial from Petitioner for five weeks and intentionally was negligent in failing to raise the lying issues at the panel argument, although the Order states that the issue could be raised at Argument on July 16, 1991. Also, petitioner told his attorney several times to raise the lying issues in Argument before the panel and again at the Courthouse shortly before the argument of the case.

Respondents included in the Appendix as Exhibit "A" the Superior Court's Judgment, Order and Memorandum of 35 pages, which includes Petitioner's Indictment, although this is not included in their Table of Contents.

The Indictment states that:

"THE GRAND JURY FURTHER CHARGES (COUNT FIVE) THAT:

1. Paragraphs 1 through 4 of

Count One are hereby incorporated by reference."

This statement is being intentionally and manipulatively misconstrued by the Respondents. Respondents want to lead this Honorable Court into believing this means that Count V on page 10 of the Indictment is incorporated by reference into the scheme of Count I. In fact, and obviously, the scheme of Count I is to be incorporated into Count V which cannot be because the separated Count V is not even remotely connected with or even mentioned in the scheme of Count I of the Indictment.

It is obvious because the separated COUNT FIVE states:

1. Paragraphs 1 through 4 of Count ONE are hereby incorporated by reference.

2. On or about January 23, 1978 defendant, Joseph Alberici, in the Eastern District of Pennsylvania, having devised this scheme, for the purpose of executing this scheme to defraud, and attempting to do so,

did knowingly and wilfully cause to be delivered by mail, according to the directions thereon, a letter containing Schedules of Value and Loss for a fire loss on August 6, 1977, at 247 Concord Road, Aston Township, Pennsylvania, which letter was addressed to Mr. Steven F. Derrung, Curly (sic) Adjustment Company, 306 Walnut Street, Philadelphia, PA 19106. (Petitioner questions how the Grand Jury arrived at the date of January 23, 1978 when the documents are dated 1977? No one testified before the Grand Jury with regard to Count V). There is no mention here of any lying issue raised by the Respondent and acknowledged by the Superior and Supreme Court, nor is there any mention of this in the scheme of Count I.

The Indictment further states in paragraph (P): "It was further part of the scheme that defendant Joseph Alberici, through the Young Adjustment Company, for the purpose of collecting insurance proceeds for the damage done by the theatre fire would and

did cause proofs of loss, executed by the defendants, to be forwarded to the Insurance Placement Facility of Pennsylvania, the General Accident Insurance Company and Safeguard Mutual Insurance Company. (Q) It was further part of this scheme that defendant Joseph Alberici would and did by the means described in paragraph (P) above attempt to collect $214,244.00 for loss and damage to the theatre caused by the fire, (R). It was further part of this scheme that on the sworn statements and proofs of loss described in paragraph (P) above, defendants Joseph Alberici would and did represent that the cause of the loss occasioned by the August 6, 1977 fire was "unknown to insureds", which respresentations were false and fraudulent in that defendant Joseph Alberici had created a scheme to cause the fire and had performed acts in furtherance of the scheme.

These insurance companies described in paragraphs (P), (Q) and (R) were voluntarily

dismissed by the Federal Prosecutor and the Judge. Thus, they destroyed the Indictment scheme, proofs of loss for damage to the theatre, and fire was "unknown to insureds." Further, anyone can see that the scheme of Count I and paragraphs (P), (Q) and (R) make no mention of the names Curley Adjustment Company, Steven Derrung or Steven Perrone in the scheme of Count I. Neither do paragraphs 1 through 4 mention the names attached to the separated Count V and there is no mention of any insurance company in Count V.

The Pennsylvania Superior Court in A-21 states: "Federal Statute requires specifically that a scheme be devised to defraud and the mails be utilized in furtherance of the artifice to constitute a contravention of the legislation; 1341. Frauds and Swindles, etc. Grand Jury 49(A) document copy, the basis of Count V, was absolutely never mailed.

Further, in Appendix A-18 the Superior Court stated: "Except for paragraph IV(H)-

(N), none of the theories of fraud required any finding of arson on Alberici's part in order to find him guilty. There were alleged alternatives of culpability which were mutually exclusive with regard to the allegation of arson. We conclude that the averment of arson is not essential to the jury's verdict. Harter, supra. As a result, Alberici's conviction could not have been received as conclusive proof of his guilt of arson. This conforms to the Harter v. Reliance Insurance Company decision as stated in Petitioner's Writ of Certiorari.

If Respondents new supplemental lying issues not of record in the lower court have been considered and allowed to remain on record before this Honorable Court, then petitioner's new truthful issue should also be allowed to remain on record for consideration. Joseph DiTizio, the only witness to falsely implicate me in procuring the arson, recently "recanted his testimony" in a Sworn Affidavit under Oath. Mr. DiTizio

states he did NOT participate in the movie theatre arson. He was forced to falsely implicate me by the federal prosecutors and Vincent Fardella to protect his own interest and he did not know Mr. Fardella.

It is incredible that the Respondents, after submitting their fatal, intentional misrepresentation and fraudulent lies to three courts below again submit them to this Honorable Court. Petitioner filed Motions to Strike in each court below (which were completely ignored.) This confirms Respondents' desperation to submit the same lies to this Honorable Court. Especially since they intentionally failed to confirm their lies by attaching an Affidavit or Verification.

It is no wonder that all the original mail fraud evidence and copies are missing and/or destroyed since 1986; missing from the United States Attorney's Office, Judge Pollak's Chambers and the Alcohol, Tobacco and Firearms Bureau Laboratory. Besides the

fact that the Alcohol, Tobacco and Firearms Bureau in Washington, D.C. destroyed these documents, the original Count V Grand Jury 49A document is missing from Safeguard's file.

Petitioner, Joseph Alberici, hereby incorporates by reference herein all the issues raised in his Writ of Certiorari No. 92-1369.

The factual issues herein are authentic, and Petitioner submits a notarized Affidavit to confirm the issues raised herein as Appendix B.

CONCLUSION

Therefore, Petitioner requests that this Honorable Court grant him certiorari.

_____

Joseph Alberici

APPENDIX

APPENDIX A

IN THE COURT OF COMMON PLEAS

OF DELAWARE COUNTY, PENNSYLVANIA

CIVIL ACTION - LAW

JOSEPH ALBERICI AND THERESA ALBERICI, h/w	:	NO. 78-10515
vs.	:	
SAFEGUARD MUTUAL INSURANCE COMPANY, et al.	:	FILED 8/10/88

PLAINTIFFS' MEMORANDUM OF LAW

ON THEIR OBJECTIONS TO THE

DEFENDANTS' REQUEST FOR ADMISSIONS

PROCEDURAL HISTORY

Defendants filed a Request for Admissions under Rule 4014. Plaintiffs filed an objection to the Request for Admissions. Defendants then filed a motion to determine the sufficiency of Plaintiffs' responses to their request for admissions. Plaintiffs filed a response to that motion and now file this Memorandum of Law in support thereof.

REVIEW OF DEFENDANTS' REQUEST FOR ADMISSIONS

The Defendants' Request for Admissions in essence sets forth the various paragraphs of the indictment in Criminal No. 82-00267 in the Eastern District of Pennsylvania, specifically those paragraphs in Count I, and then requests Plaintiffs to admit that Plaintiff, JOSEPH ALBERICI, did each and everything detailed in the indictment. The request is aimed toward proving that if MR. ALBERICI was convicted of certain crimes in regard to the alleged arson of the Jerry Lewis Theatre, then he is not capable of collecting on the insurance policy.

Plaintiffs objected to these requests as the use of the criminal conviction in this case is not proof of comparable facts in this civil case and in effect should not control the outcome of this case.

THE ISSUE OF COLLATERAL

ESTOPPEL AND ITS EFFECT IN THIS CASE

The Supreme Court in Ashe v. Swenson, 397 U.S. 436, 90 S. Ct. 1189, 25 L.Ed. 2D 469

(1970) defined Collateral Estoppel:

"Collateral Estoppel" is an awkward phrase, but it stands for an extremely important principle in our adversary system of justice. It means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit. 397 U.S. at 443.

In regard to the present case, the Defendants cl;aim that collateral estoppel will prevent the Plaintiff, JOSEPH ALBERICI, from collecting the insurance proceeds for two reasons:

1. That he procured the alleged arson; and
2. That he fraudulently submitted claims under the fire insurance policies.

If we are to adhere to the definition of collateral estoppel in Ashe, supra, then we must determine if two ultimate facts were determined in the previous criminal case:

1. Did MR. ALBERICI submit fraudulent claims under the insurance policies?
2. Did MR. ALBERICI commit arson or procure arson?

Looking first at the facts regarding the alleged submission of fraudulent claims we see the following:

Plaintiff, Joseph Alberici, believes that a step-by-step dissection of the indictment and its comparison against the physical evidence and testimony offered by the government at trial will show the Court that the conviction is not based on grounds adequate to deny Plaintiff the proceeds of the policies.

Plaintiff disputes the allegations in paragraphs one (1) through three (3) of the indictment only insofar as they ignore the fact that Co-Plaintiff, Theresa Alberici, also put up the purchase money for the premises at 247 Concord Road, Aston.

Paragraph four (4) of the indictment

alleges that Plaintiff "did devise a scheme and artifice to defraud and obtain money" by false means. Paragraph four (4) is then subdivided into letter paragraphs A through R which purport to define or more fully set out the alleged scheme.

(1) Paragraphs A through F allege that Plaintiff purchased the following fire insurance policies which have the following purchase and expiration dates:

Purchase Date	Company	Amount	Exp. Date
5/14/77	Safeguard Mutual	$100,000	8/14/77
7/15/77	Ins. Place. Facility PA	100,000	7/15/78
7/25/77	General Accident	125,000	7/25/78
7/26/77	Quaker State Mutual	75,000	7/26/78
7/26/77	Eastern Mutual	75,000	7/26/78
8/02/77	Safeguard Mutual (Contents)	25,000	7/26/80

Initially, the fact that is very interesting to note is that Counts 1, 2, 3, 4 and 6 of the indictment were dismissed by an order of District Judge Pollak dated October 11, 1985. In regard to the above insurance companies the dismissed counts correlate as follows:

Count No.	Insurance Company
1	Safeguard Mutual
2	Insurance Place. Facility
3	Safeguard Mutual
4	General Accident

There were no counts charging Plaintiff with anything insofar as either Quaker State Mutual or Eastern Mutual Insurance Companies were concerned.

Therefore, there was no insurance company which was found to be defrauded.

By his action Judge Pollak in fact shattered the alleged "scheme" of the indictment so that no scheme could exist where the remaining Count (Count 5) could not refer to items that were dismissed and where its allegations (Count 5) referred only to Mr. Horowitz allegedly writing a letter to a man who did not exist (Mr. Derrung) and who was employed by a non-existent company ("Curly Adjustment Company") (sic) and which letter Mr. Horowitz could not even say he mailed.

There was one count, number five (5), of which Mr. Alberici was found guilty. The

question then must be: Does Count Five relate to any insurance company?

In summary, Count Five alleges that on or about January 23, 1978, Mr. Alberici caused a letter to be delivered by mail containing schedules of value and loss for the Jerry Lewis fire of August 6, 1977, to "Mr. Steven F. Derrung, Curly Adjustment Company, 306 Walnut Street, Philadelphia, PA 19106."

The person that Mr. Alberici is alleged to have caused to have sent the letter is Bertram Horowitz, Esquire, an owner and adjuster for the Young Adjustment Company. Several specific facts regarding this letter stand out:

1. It was addressed to Mr. Steven Perrone not Mr. Steven F. Derrung, as the indictment indicates.

2. The Curly Adjustment Company is spelled "Curley" not "Curly", as noted in both Mr. Horowitz's letter and the indictment.

3. That the letter used at trial as Exhibit 12 had letterhead, a purported signature of Mr. Horowitz by Joyce Brown and a receipt stamp of Curley Adjustment Bureau. This was not the letter submitted to the Grand Jury as Exhibit 49(a) and, therefore, varies from the evidence upon which the indictment was drawn. Exhibit 49(a) had no letterhead on it, no signature and no rceived stamp.

4. That Mr. Horowitz had previously written to Safeguard on November 2, 1977, and it was not necessary to write to Mr. Perrone on January 23, 1978, when Safeguard had already denied the Alberici claim on October 12, 1977, and on October 14, 1977. Safeguard had cancelled its remaining contents policy with Plaintiff effective October 29, 1977, which policy was covered under Count 1. The other policy had lapsed.

5. Mr. Perrone closed his file and terminated his representation for and of Safeguard by his letter dated October 19,

1977; therefore, he was not working for Safeguard on January 23, 1978, nor their agent. A letter to him, therefore, could not be pat of a scheme to defraud Safeguard.

6. On January 26, 1978, Mr. Perrone reiterated that his file was closed as to Safeguard and sent a copy of his letter to Young Adjustment Co.

Further, in a deposition dated February 12, 1988 (pp. 5-7) Mr. Horowitz said Mr. Alberici did not seek out him, rather he sought out Mr. Alberici. That is definitely not what one would consider as conduct for a party who is allegedly scheming to defraud.

Mr. Horowitz also pointed out the following facts:

1. It was his contractor, not Mr. Alberici, who established an estimate of the loss.

2. His letter of January 23, 1978 was not sent by certified mail to Mr. Perrone.

3. That there is nothing to indicate that his letter of January 23, 1978 was ever

mailed.

4. That sometime after January 23, 1978, Mr. Horowitz at a deposition of Mr. Alberici found that there were two additional insurance companies (Quaker State and Eastern Mutual) that Mr. Alberici never told him about and for which no proofs of loss or claims had been filed.

5. That Mr. Horowitz had no personal recollection of signing and mailing the letter of January 23, 1978 to Perrone. (2) Paragraph G merely indicates that the policies noted in Paragraphs A through F were in force on the date of the fire, August 6, 1977.

6. According to an affidavit of Bertram Horowitz dated November 18, 1985, the Plaintiffs did not authorize this letter or know of its existence. In addition, as previously noted on page 6, Plaintiffs had in fact filed their claims on November 1-2, 1977, and the second filing was unnecessary.

"Collateral estoppel is issue

preclusion.... It seeks to prevent the relitigation of a finally litigated issue in a subsequent proceeding between the same parties whether the same or different evidence is to be introduced." Com. v. Hude, Pa., 425 A.2d 313 at 322 (1980).

In this case, the parties are for purposes of this issue, JOSEPH ALBERICI and the various insurance companies.

Looking at the issues in the federal criminal trial, there was an acquittal of Plaintiff as to all issues relevant to the insurance companies. Only Counts 1 through 4 pertained to the insurance companies (as noted previously, he was not even charged with fraud as to two companies that he made claims on).

Taking the argument of the insurance companies one step further (that is, that he was convicted of Count Five, which included by reference and incorporation the numbered and lettered paragraphs of Count One), it could well be argued that he was found not

guilty of Count One and therefore those allegations when incorporated in Count Five had no relevance and did not result in a finding on an ultimate issue.

There is no allegation in Count Five that MR. DERRUNG (who is not even the person the letter was addressed to) works for an insurance company or that he was a person sought to be defrauded. But even if we look to extrinsic evidence, we find that at one time MR. PERRONE (the name of the real person or addressee) worked for SAFEGUARD.

However, MR. ALBERICI was found not guilty of attempting to defraud SAFEGUARD (Counts 1 and 3) and the letter to MR. PERRONE was written subsequent to the time when he was no longer retained by SAFEGUARD.

In fact, the letter submitted to the Grand Jury as Exhibit 49(a) was not the same letter submitted at trial as Exhibit 12. (The Grand Jury letter had no received stamp, no letterhead and no signature, while the letter offered at trial had a received stamp,

letterhead and dots where a signature would be. In essence, while the government did not de facto alter or vary the indictment, it did vary it by offering evidence which differed from that offered to the Grand Jury, and that is a fatal defect under statute, court rules and case law.) What this fact indicates is that a conviction based on evidence not submitted to the Grand Jury cannot be upheld and should not be considered determinative of an ultimate issue. See Russell v. United States, 369 U.S. 749, at 770, 82 S. Ct. 1038,8 L. Ed. 2d 740 (1962).

The second issue sought to be proved by the admissions is whether or not the federal conviction is determinative of whether MR. ALBERICI was guilty of arson or of attempting to procure arson.

Initially, arson is a state crime and not a federal crime. See, 18 Pa. C.S.A., Section 3301. However, there are instances wherein certain actions similar to arson are covered by federal statute: 18 U.S.C.,

Section 844 (and other parts of Chapte 40).

But, these sections were not charged against MR. ALBERICI and, therefore, cannot be determinative of the ultimate issue of whether he caused or procured arson. If the evidence was there to prove them, certainly they would have been charged.

MR. ALBERICI was charged only with mail fraud.

If there was sufficient evidence to prove that MR. ALBERICI was guilty of arson or procuring arson then the District Attorney of Delaware County certainly would have acted on that information.

THE USE OF THE COLLATERAL ESTOPPEL DOCTRINE IS TO BE BASED ON A CASE-BY-CASE ANALYSIS AND THE FACTS IN THIS CASE DO NOT WARRANT IT.

In Hurtt v. Stirone, 416 Pa. 493, 206 A.2d 624 (1965) the Court stated:

> Moreover, there is a growing tendency to decide each case upon its particular facts with a view toward applying the exclusionary rule only where reason

and logic so demand. 206 A.2d at 625.

In Loughner v. Schmeizer, 421 Pa. 283, 218 A.2d 768 (1966) Justice COHEN, in a dissenting opinion, stated:

> I would adhere to the general rule of evidence that would prevent the admission of a conviction of a criminal offense in subsequent civil actions; but if I were to depart from that rule I would require more certain standards than thoise which have been expressed in Hurtt v. Stirone.

In Com. Dept. of Transp. v. Mitchell, 535 A.2d 581 (Pa. 1987), Chief Justice Nix, dissenting stated:

> I have serious reservations as to the correctness of the judgment in Hurtt v. Stirone, 416 Pa. 463, 206 A.2d 624 (1965). The fact that a person is found guilty in a criminal trial should not preclude that individual from contesting his

> guilt of those facts in a civil trial. This does not mean that the fact of the criminal conviction may not be introduced during the subsequent civil trial....
>
> 535 A.2d at 588.

Finally, it appears that the issue of collateral estoppel, if applied in thiscase, would be a travesty of justice as the government's case was not only carelessly drawn and carried out, it amounted to a mockery of justice that an individual could be conviced with such trumped-up, illegal evidence. The technical legal issues that the parties are not the same, the issues are not the same and the facts are not the same, as required for the application of the collateral estoppel rule, wilt before the mockery of justice perpetrated by the government in this case.

THE INDICTMENT AGAINST PLAINTIFF, JOSEPH ALBERICI, WAS LEGALLY INSUFFICIENT, IMPROPERLY FRAMED AND FATALLY DEFECTIVE

"Two of the functions of an indictment are to apprise the Defendant of the charge of which he is accused and to provide protection against reprosecution should an acquittal result." U.S. v. Goldstein, 502 F.2d 526 (1974).

In this case the government presented Exhibit 49(a) (allegedly Horowitz's letter of January 23, 1977), but that letter was not presented as evidence at trial. Instead, Exhibit 12 appeared complete with letterhead, a received stamp and dots where a signature should be. The government in effect varied the indictment when it did this contrary to all procedure. U.S. v. Goldstein, supra, U.S. v. Russell, supra.

U.S. v. Goldstein continues:

> "But there is a third and very important aspect of the indictment process, and that is the duty of the grand jury to shield a citizen from unfounded charges and to require him to appear in court in defense only if

probably cause has been found by that independent body." 502 F.2d at 529.

No person testified before the Grand Jury on the facts regarding Count Five: NOT HOROWITZ, the alleged writer; NOT PERRONE, the alleged receiver (referred to as Mr. Derrung in the indictment); not the office staff of either the alleged writer or the alleged receiver to show that the ltter was mailed, was received or in what manner it was delivered.

Goldstein continues further:

"Thus a conviction of a defendant cannot be upheld on the basis of facts not found by and perhaps not even presented to the grand jury which indicted him." 502 F.2d at 429.

"No person shall be held to answer for a capital or otherwise infamous crime unless on presentment or indictment of a grand jury...." 502 F.2d at 530.

The indictment Count 1, subparagraph Q, alleges that Joseph Alberici attempted to

collect $214,244.00 for loss and damage to the theatre by fire but the indictment failed to charge him with any wrongdoing as to Quaker State and Eastern Mutual (Home Mutual) and if those two companies are not included then the amounts that they respectively pay, $29,756.15 and $29,756.15, for a total of $59,512.30, which would really mean that the allegation should have been $154,727.709, not $214,240.00.

Paragraphs H through J of the indictment indicate that the Plaintiff called Joseph DiTizio on July 28, 1977, for the purpose of asking him to arrange for setting a fire in the theatre and that on the same date DiTizio contacted Charles Allen to help him and that Allen contacted Vincent Fardella (a/k/a Vincent Mayo) for his help.

But the following contradiction appears in testimony:

In his testimony at the federal court trial, Joseph DiTizio stated that he called Mr. Alberici, not that Mr. Alberici called

him. He also stated that he never actually spoke with Mr. Alberici on the phone.

Paragraphs K through M of the indictment allege purchase, transportation and use of naptha and acid to set fire to the Jerry Lewis Theatre.

But the lab reports and the laboratory evidence receipt and the Aston Township Police Supplement Report indicate only one 55-gallon drum which contains phenol, not naptha. But the testimony at the Grand Jury and at trial indicated that 55-gallon drums of naptha were transported. Where were the drums of naptha?

The Report of Investigation by Agent Lorry includes a statement that 110 gallons of naptha were used but no 55-gallon drums were ever found. This was the basis of the Title XI Determination (explosive substances used in violation of 18 U.S.C., Section 844), to give federal jurisdiction. And the statement of A.T.F. dated April 9, 1979, which could neither identify naptha or gasoline used in the fire.

But the report of Dr. Grant Krow states that the contents of two 55-gallon drums of naptha could not have been used. Even one such drum would have exploded a theatre four and one-half times the size of the Jerry Lewis Theatre. but he indicated that there was not a major explosion destroying the theatre and the lower part of the theatre where the vapors would have collected was undamaged.

In addition, Dino D'Agata, owner of the premises on which Ulmer and Co. alleged sold naptha to Allen and Fardella, says that no naptha was kept on the premises.

The alleged invoice from Ulmer & Co. purposely left off the invoice number and was identified as #1480 at trial, though invoices 14835-14837 were issued the same day. Agent Lorry (Exhibit marked No. 31) indicated that it was Invoice #1480 and that he initialled it but no initials appear on the invoice marked Exhibit 21A.

The alleged expert arsonist, Fardella, left his home phone number allegedly on the

sales invoice #1480 from Ulmer & Co. See Exhibits 21A and 22.

In the A.T.F. Bureau report marked pages 32-33, Allen gave directions as to where he bought the naptha, which took the agents not to Ulmer & Co. but to Sibiski's Auto Body in Bellmawr, New Jersey. On page 68 of the report, Fardella did not even recognize Ulmer & Co. as the place where the naptha was bought. Further, Fardella testified on January 10, 1983, on direct testimony by A.U.S.A. Stephen Wehner that the only reason he knew where the naptha came from was that Mr. Wehner told him.

Mr. Teplick of Ulmer & Co. could not identify the persons who were supposed to have bought the naptha from him and who were there on two occasions; once to order it and once to pick it up.

Vincent Fardella said that there was no explosion at the theatre; he said things completely inconsistent with the alleged presence of 110 gallons of naptha and with Dr. Krow's report and testimony. See page 18 of Fardella's Grand Jury testimony.

See Fardella's trial testimony of January 10, 1983, attached.

Statements by Fardella and Allen indicate that DiTizio was not at the fire scene, was not involved and was not indicted. See copy of indictment of Charles Allen dated February 2, 1980, especially paragraph "S".

Also enclosed herewith are the papers relevant to the lie detector test wherein Fardella said that only Fardella and Allen were involved, not DiTizio and the reason for the lie detector test is shown on the attached letter of August 10, 1981, and the A.T.F. report.

The government on December 23, 1981, admitted on the record that DiTizio was not involved. See also A.U.S.A. Stephen V. Wehner's letter dated January 4, 1982.

On January 18, 1982, Judge Pollak granted the motions of DiTizio to sever the case, indicating that he believed the testimony of Fardella that DiTizio was not present and the other evidence offered and cited above.

Later, when Fardella was changing his

plea, he said that he, Allen and Di Tizio were at the fire.

Then on other occasion he said only Allen was there; then after constant badgering he said DiTizio was present.

On November 19, 1982, Fardella stated that he did not know DiTizio and that at the arraignment he only knew him because his lawyer told him who DiTizio was.

Finally, the three parties allegedly involved all gave differing statements as to the amounts oif money involved, and Count Five, 49(a) was never related or attached to any insurance company in any litigation involved in the civil and criminal cases.

CONCLUSION

The record of conviction should only be admitted as evidence and not as conclusive proof of the fact that Plaintiff, Joseph Alberici, procured the arson or fraudulently submitted claims under the fire insurance policy. The Requests for Admission are too broad in that they do not specifically look to all the facts which came out in the federal trial but simply attempt to use an

indictment scheme when that indictment scheme was in fact shattered by Judge Pollak's decision and should not be used against Plaintiff.

APPENDIX B

COMMONWEALTH OF PENNSYLVANIA :

SS

COUNTY OF MONTGOMERY :

JOSEPH ALBERICI, being duly sworn according to law, deposes and says that the facts set forth in the foregoing Reply to Respondents' Brief in Opposition are true and correct to the best of his knowledge, information and belief.

Joseph Alberici

JOSEPH ALBERICI

Sworn to and subscribed
before me this 29th day
of March , 1993.

Barbara L Hicks

Notary Public

Notarial Seal
Barbara L. Hicks, Notary Public
Lower Merion Twp., Montgomery County
My Commission Expires March 19, 1996
Member, Pennsylvania Association of Notaries